TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 239.

MARTHA RAPHAEL, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL W. RAPHAEL, DECEASED, APPELLANT,

vs.

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWARD M. BULKLEY, CHARLES J. PEABODY, AND AGNES NICHOLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 5, 1903.

(16,884.)

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1 [L. S.] The President of the United States of America to Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby commanded that you and each of you, personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of June, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Nathaniel W. Raphael, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 30th day of Ap'l in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

CHARLES L. EASTON,
Solicitor for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of June, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

(Endorsed:) U. S. circuit court, Filed Jun- 10, 1901. John A. Shields, clerk.

2 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity

To the honorable judges of said court in chancery sitting:

Your orator respectfully shows unto your honors that he is a citizen of the State of New Jersey and that the defendants Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols are citizens of the State of New York, and of the said southern district of New York. That the amount in controversy in this action exceeds the sum of two thousand dollars, exclusive of interest.

That your orator brings this suit on his own behalf and on behalf of the holders of other bonds as hereinafter described, who may choose to become co-complainants, upon offering to contribute a *pro rata* portion of the costs and expenses of this action.

Your orator respectfully shows that on January 7th, 1901, he filed a bill of complaint in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, and Union Trust
3 Company of New York, as trustee to foreclose a mortgage given by the said Wasatch & Jordan Valley Railroad Company, a railroad line consisting of about forty-four miles, located in Salt Lake county, Utah, and to redeem from two underlying mortgages on about thirty-three miles of said road that is in the possession of the Rio Grande Western Railway Company and as alleged by said complainant the said The Rio Grande Western Railway Company is in possession of the whole of said forty-four miles of road as mortgagee under said prior mortgages. In addition to the prayer of the bill of foreclosure and redemption from said underlying mortgages, the bill prays for an accounting on the part of the Rio Grande Western Railway Company for the use and occupancy of the mortgaged premises and that a receiver be appointed to take possession and operate said railroad during the pendency of said suit, and that the Rio Grande Western be enjoined from encumbering or otherwise disposing of the mortgaged premises during the pendency of the suit. A copy of said bill of complaint is herewith attached marked Exhibit A and made a part hereof.

On the 28th of March, 1901, your orator made application before his honor, Amos M. Thayer, one of the circuit judges for the eighth circuit of the United States, at chambers in the city of St. Louis, Missouri, within the said eighth judicial circuit, for the appointment of a receiver *pendente lite*, pursuant to the prayer contained in the said bill of complaint; preliminary to the hearing of the motion for the appointment of a receiver, the Central Trust Company of New York, and the Morton Trust Company of New York, as trustees
4 under certain deeds of trust executed by the Rio Grande Western Railway Company, to secure certain of its mortgage bonds and because by reason of said trust deed, the said last named companies claimed to have some interest in the *res* they were allowed to become parties defendant, and they have until the first Monday of May next, to plead answer or demur to said complainant's bill.

The said defendants, The Wasatch & Jordan Valley Railroad Company, and The Union Trust Company of New York, trustee, are in default, for not having appeared or pleaded, answered or demurred, to complainant's said bill of complaint on or before the first rule day of April, 1901, after having been served in pursuance of the orders of said court to plead, answer and demur on or before said last named rule day.

The defendant The Rio Grande Western Railway Company on the 25th of April, 1901, filed its answer to complainant's said bill of

complaint, a copy of which answer is herewith attached, marked Exhibit B, and made a part hereof.

Your orator shows that at said hearing for the appointment of a receiver, complainant offered, aside from his verified bill of complaint, certain affidavits and documents and depositions, and the Rio Grande Western Railway Company in opposition to said motion for a receiver, offered in evidence certain affidavits, and documents, copies of which moving papers and opposing papers are herewith attached, marked Exhibits C, D and E, and which are made a part hereof.

Your orator further shows that on the 6th day of April,
5 1901, the said Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols, composing the firm of Spencer Trask & Company, carrying on business in the city of New York as bankers, caused to be published the following advertisement in the New York Herald, a daily newspaper published in the city of New York, viz:

6 Financial.

Office of Spencer Track & Co., 27–29 Pine Street, New York.

Notice to Stockholders.

RIO GRANDE WESTERN RAILWAY COMPANY,
27 PINE STREET, NEW YORK CITY, 2*d April*, 1901.

To the stockholders of the Rio Grande Western Railway Company:

We have, in behalf of the holders of more than 90 per cent. of the common stock of the Rio Grande Western Railway Company (being a majority of its entire stock) and the owners of certain allied properties and securities, negotiated for them as vendors with representatives of the Denver & Rio Grande Railroad Company the sale of such majority of common stock, together with such allied securities and properties. The sale by the vendors is subject to ratification by the stockholders of the Denver Company; and a copy of the circular issued to them is herewith enclosed for your fuller information.

We have secured the right to include in the contract all the outstanding common stock, and this circular is issued to advise you that we will accordingly, include in our sale and delivery for the vendors the shares of all other holders who shall, pursuant to the provisions of this circular, deposit their certificates with us prior to the 30th day of April, 1901. Such certificates must be properly endorsed and accompanied by powers of attorney empowering us to give any vote or assent necessary to close the transaction. The
7 deposit will give us the right, if necessary, to transfer the stock into our own names for the purpose of such vote or assent. In lieu of deposit we will accept an obligation to deliver stock given by any member of the New York stock exchange, or by bankers satisfactory to us, but in every such case these certificates must first be transferred into the name of our firm, whereupon

we will endorse it for negotiability and return it to the party giving the obligation.

The price allotted to the common stock by the vendors for whom we have acted is $80. per share, with interest at 4 % per annum from January 1, 1901, to the date of the payment, this amount being reached after deduction of our commission of five dollars per share for our part in the transaction. Since the commencement of the negotiation one Raphael has instituted in the United States circuit — for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80. per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust.

By the terms of the sale the purchasing bankers undertake upon the conclusion of the transaction to procure four preferred stockholders in the Rio Grande Western Railway Company the option
for a reasonable period to exchange their shares for shares of
8 the preferred stock of the Denver & Rio Grande Railroad Company, at the rate of ten shares of the Western stock for eleven shares of the Denver stock. We expect to make such exchange of our own holdings of the preferred stock, and shall recommend to our clients to avail themselves of the option when tendered. The preferred dividend paid by the Denver Company for the six months ending December 31 last was 2½ per cent. Our knowledge of the property of the two companies makes us confident that their reunion under one management should be of great advantage to both.

Within a few days we shall issue forms for transmittal of certificates of the common stock, with proper powers of attorney on deposit or bankers' obligations therefor.

SPENCER TRASK & COMPANY.

Your orator further shows that accompanying said advertisement in the New York Herald of April 6, 1901, there was an advertisement by the Denver & Rio Grande Railroad Company which advertisement is as follows, viz:

9 Financial.

Notice of Special Meeting of Stockholders of the Denver & Rio Grande Railroad Company.

DENVER, COL., *April* 1, 1901.

To the holders of both preferred & common stock of the Denver & Rio Grande R. R. Co.:

Notice is hereby given that a special meeting of the stockholders, both common and preferred, of the Denver & Rio Grande Railroad

Company will be held at the principal office of the company, in the Equitable building at Denver, Colorado, upon Wednesday, the 15th day of May, 1901, at 2 o'clock p. m., for the following purposes:—

1. For the purpose of submitting to a vote of the stockholders of the company the question of purchasing the line of railroad of the Rio Grande Western Railway Company by acquiring the common and preferred stock of that company.

2. For the purpose of submitting to a vote of each class of the stockholders of the company the question of reducing the capital stock of the company, as at present authorized, by cancelling the unissued stock now held in the trea-ury for the purpose of acquiring the property and franchises of the Denver & Rio Grande Western Railway Company—namely, preferred stock to the amount of four million three hundred and fifty thousand dollars ($4,350,000) at par, and common stock to the amount of seven million five hundred thousand dollars ($7,500,000) at par—and thereupon and thereafter increasing the capital stock by increasing the preferred stock from twenty three million six hundred and fifty thousand dollars
10 ($23,650,000.) to forty four million four hundred thousand dollars ($44,400,000.), and of amending and changing the sixth article of the articles of incorporation of the company so as to read as follows:—

Sixth. The capital stock of this company shall be eighty-two million four hundred thousand dollars ($82,400,000) divided into eight hundred and twenty-four thousand (824,000) shares of the par value of one hundred dollars ($100) each. Said stock shall be divided into preferred and common stock as follows, to wit:—Thirty-eight million dollars ($38,000,000), common, forty four million four hundred thousand dollars ($44,400,000) preferred; said preferred stock to be entitled to a non-cumulative dividend of not more than five per cent. per annum, payable out of the net earnings of the company before any dividend shall be declared and paid upon the common stock.

3. For the purpose of submitting to a vote of the preferred stockholders of the company the question of assenting to the issue, for future capital requirements, of the consolidated mortgage bonds of the company amounting to $6,900,000. reserved by the mortgage for the purpose of acquiring the property and franchises of the Denver & Rio Grande Western Railway Company, or for extending the line of railroad of the company to Ogden, as such bonds are not required for said purposes.

4. For the purpose of submitting to a vote of each class of the stockholders of the company a proposed amendment of article ninth of the articles of incorporation of the company, so that the same shall read as follows:—

11 Ninth. The stockholders of this company, or the directors whenever and for such length of time as the stockholders shall so elect, shall have power to make from time to time such prudential by-laws for the government of the company as may be necessary. By a two-thirds vote of their entire number, the directors

shall have power at any time to re-vote any such by-laws or to amend the same in any respect. The meeting of the board of directors of the company may be held in the city of New York or elsewhere beyond the limits of the State of Colorado as shall be provided by the by-laws.

The transfer books for the transfer of stock of the company will close with the close of business on Monday, April 15th, 1901, and re-open on the morning of Thursday, May 16th, 1901.

By order of the board of directors.

THE DENVER & RIO GRANDE
RAILROAD COMPANY,
By EDGAR H. BOOTH, *Secretary.*

Subject to authorization of the increase above proposed $12,500,000. of the new preferred stock will, at the request and on behalf of the parties entitled thereto under the arrangement for acquiring the said property be offered by this company to its stockholders, At the price of 90 % holders of the stock of the company, of record at the closing of the transfer books on April 15th, 1901, may purchase said increased preferred stock at that price, and at the rate of one share of the new preferred stock for every five shares of stock (common or preferred) held by them. The right to purchase will terminate at three o'clock on May 1st, 1901, and must be exercised by actual delivery at the office of the company, No. 47 William St., New York city, on or before that date, of an application for shares and agreement to purchase, executed upon a form which will be mailed to stockholders, and which may be obtained at said office of the company. Payment on account of such purchase must be made at the office of the company:—$20. per share at the time when the agreement to purchase is there lodged, and the balance on May 20th, 1901. On that date the new preferred stock, or interim certificates representing the same, will be there deliverable to such purchasers; or, in the event that such increase of said preferred stock shall not have been authorized, the previous payment of $20. per share will be refunded to the holders of receipts representing such payment upon surrender of the receipts. No subscription for a fraction of a share will be received; but as rights to purchase may be assigned in accordance with a blank form which will be mailed to shareholders and which may, upon application, be obtained at said office of the company in New York, any holder of the certificate of stock for a number of shares which cannot be divided by five without leaving a remainder may, before making a subscription, buy or sell on the open market enough right to make his holdings so divisible. The company will not itself buy or sell rights. Failure to pay the balance of the purchase price when and as payable will terminate all rights in respect to the shares applied for and the instalment previously paid.

12

THE DENVER & RIO GRANDE
RAILROAD COMPANY,
By EDWARD BOOTH, *Secretary.*

13 Your orator shows that on the 27th day of April, 1901, leave of court was granted by Judge Thayer, allowing complainant to amend his said bill of complaint in some slight particulars and which said amendment is herewith attached and set out in Exhibit D, and made a part hereof.

Your orator further shows that on the said 27th day of April, 1901, his honor, Judge Thayer denied complainant's application for a receiver, *pendente lite*, without passing upon the merits of complainant's bill, on the ground, as he stated, in rendering his decision, that he did not believe the complainant would be injured by the non appointment of a receiver, pending the suit.

Your orator further shows that said suit is pending and undetermined, and that if the scheme of Spencer Trask & Co., is allowed to be carried out, that it will hinder and delay your orator in the prosecution of his said suit in Utah.

Your orator shows that the said defendant George Foster Peabody in his affidavit, defendants' opposing papers (Exhibit E, folio 1188 to folios 1191) says that the provision for a fund to be created out of the sale of the shares of the capital stock of the Rio Grande Western to the Denver & Rio Grande Western is to be left in the control of Spencer Trask & Company to be held in trust as a greater assurance that if complainant's claim should be established, it will be paid.

Your orator shows that the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah and that there is no agreement existing between complainant and the
14 other holders of the outstanding bonds similar to complainant's bonds and Spencer Trask & Co. by which the said proposed "fund" shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds; that said Rio Grande Western Railway Company claims to own the said railroad covered by the said underlying mortgages by reason of certain alleged foreclosure sales had under powers of sale and advertisement, without ever having obtained any decree in any court authorizing said sales on an alleged default of interest; and your orator shows that a part of the capital stock which the scheme of Spencer Trask & Co. propose to sell, ninety per cent. of the shares of which said Spencer Trask & Company claim to have options upon from the vendors, and said advertisement is calling for a deposit with them of the other ten per cent. of the outstanding shares, provided the same are deposited with the firm of Spencer Trask & Company on or before the 30th of April, 1901, were issued on the said 44 miles of road.

Your orator shows unto your honors as he is informed and believes, that if said consolidation as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out without some stipulation between your orator and the members of the said firm of Spencer Trask & Co. as to the custody of the said fund, proposed to be created as aforesaid the rights of remote pur-

chasers of the mortgaged premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing in to the suit as defendants, such
15 remote purchasers, as the Denver & Rio Grande Western Railway Company and their proposed successors.

Your orator shows further that the mortgaged property is inadequate security for the 884 bonds, 579 of which are held by your orator, and that the Rio Grande Western, as mortgagee in possession, has after having received its mortgage debt, out of the income of the mortgaged premises, *has* as your orator is informed and believes, a surplus of over $800,000 that is applicable to complainant's bonds, and that the Denver & Rio Grande Western has bonded said forty-four miles of road or that portion covered by the underlying mortgages at over $43,000 per mile, and has issued shares of its capital stock at over $37,000 per mile of road.

Your orator further shows that the rights of the Rio Grande Western are represented by the shares of its capital stock and that the members of the firm of Spencer Trask & Company, as your orator is informed, and believes when they obtained the option upon the said shares from the said vendors had knowledge of the commencement of complainant's suit in Utah and that as your orator is informed and believes that the securement of said option from said vendors by the said firm of Spencer Trask & Company was in disregard of complainant's right, and to prevent the mortgaged premises from remaining *in statu quo* until the final hearing of his suit in Utah.

Your orator therefore prays that a preliminary injunction be issued restraining the said members of the firm of Spencer
16 Trask & Company from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company as set forth in the said advertisement of Spencer Trask & Company and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York at and before the completing of said sale of said shares, a sum of money which may be determined by this court out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own upon the final hearing of complainant's suit in Utah.

Your orator therefore prays that the said Spencer Trask, Charles Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols be made parties defendant hereto, and that a writ of subpœna be issued, against them in pursuance to the rules and practice of this court, and that they make answer, each for himself or jointly, but not under oath, their respective oaths being hereby waived, and that such other or different decree be granted to your complainant,

as to your honors may seem just, and this the nature of your orator's case require.

CHARLES L. EASTON,
Solicitor for Complainant,
Room 46, 229 Broadway, New York City.

CHARLES L. EASTON, *Of Counsel.*

17 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } ss.:

Nathaniel W. Raphael, being first duly sworn, deposes and says that he is the complainant in the above entitled suit, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated are true, except as to such matters as are therein stated on information and belief, but as to those matters, he states he believes them to be true.

Deponent further says that he believes that if the said members of the firm of Spencer Trask & Company are not restrained by an order of this court from delivering the said shares of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company before a notice shall be given of the said application for a preliminary injunction restraining the deliverance of said shares by Spencer Trask & Company to the Denver & Rio Grande Western Railway Company, deponent will be greatly injured, as he believes from the fact that the 30th day of April, 1901 is the last day for the selling of said shares, that said shares will be delivered and sold, and the scheme consummated, to the irreparable injury of deponent before a hearing can be had for said preliminary injunction.

Therefore deponent prays that a restraining order be made directing the said members of the firm of Spencer Trask & Company to withhold the sale and delivery of the said shares and to show cause, returnable at an early date, according to the rules and practice of this court, why complainant should not have a preliminary
18 injunction, as prayed for in the foregoing bill of complaint.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 30th day of April, 1901.

LOUIS HEFT,
[SEAL.] *Notary Public, No. 211, N. Y. Co.*

(Endorsed:) United States circuit court, southern dist. of N. Y.—Nathaniel W. Raphael, complainant, ag'st Spencer Trask, and others, defendants.—Bill for injunction.—Charles L. Easton, solicitor for complainant, 229 Broadway, New York city.—U. S. circuit court, Filed Apr. 30, 1901, John A. Shields, clerk.

19 In the Circuit Court of the United States in and for the Southern District of New York.

At a term of said court in chancery sitting this 30th day of April, A. D. 1901.

Present, Hon. Addison Brown, judge.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

Upon reading the verified bill of complaint in the above entitled suit, and it appearing from the affidavit of the complainant that if notice is given to the defendants of the application for a preliminary injunction prayed for in the bill of complaint, that complainant will be injured.

Upon motion of Charles L. Easton, counsel for complainant, it is

Therefore ordered that the said defendants show cause at 3 o'clock after noon, on the 1st day of May, 1901 before me at the Post Office building, New York city and county, why the preliminary injunction asked for should not be granted, and in the meantime and until further order herein, the said defendants as composing the firm of Spencer Trask & Company be and they are hereby

Ordered to withhold selling and delivering to the Denver &
20 Rio Grande Railroad Company as contemplated in the advertisement of Spencer Trask & Company the shares of the capital stock of the Rio Grande Western Railway Company, as mentioned in the said advertisement of Spencer Trask & Company, published in the New York Herald of April 6, 1901, annexed hereto.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of N. Y. Nathaniel W. Raphael, complainant ag'st Spencer Trask *et al.*—In equity.—Order to show cause and restraining order.—Charles L. Easton, solicitor for complainant, 229 Broadway, New York city.—U. S. circuit court, Filed May 1, 1901, John A. Shields, clerk.

21 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. BULKLEY, Charles J. Peabody, and Acosta Nichols.

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss:*

Edwin M. Bulkley, being duly sworn, says: I am a member of the firm of Spencer Trask & Company. The papers in this suit

were served upon me about 4 p. m. yesterday, being Tuesday, 30th April, 1901. As I am informed and believe no papers were served upon any other defendant than myself. I annex hereto all the papers served upon me. The blanks at folios 9, 10, 11, 12, 13, 14, 15, 16 and 17 were blanks when the papers were served upon me. No other papers have been served upon me.

I am not and for more than fifteen years have not been either a citizen or resident of the southern district of New York or the State of New York. I am and for upwards of 15 years have been a citizen and resident of New Jersey. For upwards of five years I have resided at Englewood in the State of New Jersey.

My partner, the defendant Spencer Trask, is neither a citizen nor a resident of the southern district of New York. He is both
22 a citizen and resident of the northern district of New York, residing and for many years past having had his residence at Saratoga in the said northern district. He is now temporarily residing and has for several months resided at Tuxedo in the State of New York.

My partner, George Foster Peabody, is not a resident nor citizen of the southern district of New York. He is a resident and citizen and for many years last past and continuously has been, a citizen and resident of the eastern district of New York, residing in the borough of Brooklyn in the said eastern district.

My partner Charles J. Peabody is not a citizen or resident of the southern district of New York or of the State of New York, but is and for many years last past has been a citizen and resident of the State of New Jersey residing at Englewood in the said State.

My firm of Spencer Trask & Co. have entered into an agreement for the delivery and sale of at least 90,000 shares of the common stock of the Rio Grande Western Railway Company (hereinafter called the Western Company) being of the par value of $9,000,000. At the time this agreement was made the present complainant had begun against the Western Company a suit, being the suit mentioned in the papers served herein, to recover or, rather redeem, from the Western Company two spurs of the railroad of that company known as the Bingham spur and Alta or Wasatch spur. The proposed purchasers of such common stock were, as I am informed and believe, not familiar with that suit; but as my firm was familiar we felt bound to protect the purchasers against any loss to or
23 diminution of the value of the common stock to be so purchased, in case the complainant's claim about the said spurs should turn out to be valid. My firm did, therefore, agree to indemnify the proposed purchasers against loss, if any, by reason of such suit. The Western Company was advised by its counsel and my firm knew of that advice and believed it to be correct, that there was no valid claim on the part of the complainant. But as the proposed purchasers could not know that or, at least, could not learn that within the short time available, my firm gave the stipulation of guaranty. That stipulation was not given to the complainant or in the complainant's interest. It had no concern with the com-

plainant. It was a stipulation only to the effect that if the complainant should succeed, then my firm would indemnify the new owners of the common stock of the Western Company as aforesaid.

My firm was itself the owner of some of the common stock proposed to be sold and in stipulating to sell as many as 90,000 shares, it had the assent of other holders of such common stock. My firm after making such agreement, invited other owners who cared to join in the sale to endorse their shares to my firm who would hold such shares as agents for such depositors and for the purposes of such sale. It was deemed proper that all owners of such common stock who should avail themselves of the sale so contracted for by my firm, should indemnify my firm against any liability to be incurred by them by reason of such guaranty. My firm, therefore, notified holders of the common stock of the Western Com-
24 pany that if they availed themselves of the sale made by my firm, they must permit my firm to deduct from the purchase price when paid a suitable amount to indemnify my firm against its liability to the purchasers. So far as concerns shares or any shares of the common stock of the Western Company or anything connected with or related to such shares of the Western Company, my firm has no relation whatever with the complainant. It has made no stipulation, contract or agreement and has had and has no understanding whatever with him. It has not acted for him in any way nor has it proposed to act for him in any way nor has it made any stipulation or contract for his benefit.

The liability of my firm under its contract is for a very large amount and is of a very serious character. The order issued herein orders my firm to withhold selling and delivering to the Denver & Rio Grande Railroad Company shares of the capital stock of the Western Company. My firm is under contract to sell and deliver either to the Denver & Rio Grande Railroad Company or to any other person or company designated by the persons with whom my firm entered into the contract aforesaid, stock as aforesaid. A breach of such agreement on the part of my firm would expose my firm to the possibility of enormous damage.

The defendants have no notice whatever that any security has been given by the complainant for the issue of the order herein and I respectfully submit that my firm ought not, under the circumstances, to be under any restraint at the suit of the complainant.

The statement of the complainant in his bill "if the scheme
25 "of Spencer Trask & Co. is allowed to be carried out, that it "will hinder and delay your orator in the prosecution of his "said suit in Utah" is absolutely without foundation. What the orator calls the "scheme of Spencer Trask & Company" is a plan to sell common stock belonging to them and to such other owners of such common stock as shall endorse their shares to them for sale. It has and can have no effect whatever on the prosecution of the orator against the Western Company and the other parties made defendants in the suit brought against that company. If he have any claim against that company his claim remains in full force no

matter what transfers shall be made of the common stock by Spencer Trask & Company or any other owners of such common stock.

With respect to the suit brought by the complainant in the United States circuit court for the district of Utah and with respect to the claim of the complainant against the Western Company, I respectfully refer to the papers submitted in behalf of the Western Company to the Honorable Amos N. Thayer, circuit judge, upon the argument of complainant's motion for a receiver.

The said Western Company is a company of very large responsibility and abundantly able to respond many times over to the utmost claim which the orator claims to have. There is no proposal whatever to interfere with the status of the premises upon which the complainant claims to have a mortgage and mentioned in his bill as "the mortgaged premises." There has been no intention
26 whatever on the part of my firm or any member of it "to pre-
"vent the mortgaged premises from remaining *in statu quo* "until the final hearing of his (complainant's) suit in Utah."

I further state upon my information and belief that the said mortgaged premises are security many times over for any and every claim which the orator has.

The orator, as I am informed and believe, acquired the pretended bonds upon which his claim is made for little if anything and as a mere speculation. The present suit is, as I am informed and believe, instituted in order to harass my firm by reason of the contract into which they have entered as aforesaid and to make what is commonly known as a "strike" upon my firm to compel it to pay money to the complainant in order to secure a release from the embarrassment of any litigation brought against it at this time and especially from the embarrassment of any suit in which a restraining or injunction order may be entered.

The complainant, as I am informed and believe, prepared and procured to be published in the New York papers of to-day, a full account of his claim, laying especial stress upon the fact that this court had issued a restraining order. This was done in order, as I am informed and believe, to put the defendants under an acute pressure to submit to a sheer and gross attempt at extortion. The complainant and his counsel, attorney and solicitors, I am informed and believe, perfectly well know that if the complainant have any claim against the Western Company that claim will be properly tried and if it be adjudged that the claim is in any respect
27 valid, then that the claim will be fully met and discharged to such extent by the Western Company.

The current directory of the city of New York, boroughs of Manhattan and the Bronx, being the directory for the year 1900, states my residence as follows: "Bulkley, Edwin M., banker, 27 Pine, h Englewood, N. J."

The same directory states the residence of my partner, Charles J. Peabody, as follows: "Peabody, Chas. J., banker, 27 Pine, h Englewood, N. J."

The same directory states the residence of my partner, Spencer Trask, as follows: "Trask, Spencer, banker, 27 Pine, h Saratoga Springs, N. Y."

The same directory states the residence of my partner George Foster Peabody as follows: "Peabody, Geo. Foster, banker, 27 Pine, h 28 Monroe pl. Bklyn."

EDWIN M. BULKLEY.

Sworn to before me this first day of May, 1901.

WM. MASON SMITH,
Notary Public, N. Y. Co.

[SEAL.]

28 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss:*

George Foster Peabody, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of thirty-five years last past been continuously and now am a citizen and resident of the borough of Brooklyn in the eastern district of New York. I am neither a citizen nor a resident of the southern district of New York or of any portion of the city of New York, except that, since the consolidation of Brooklyn with New York I have been a resident and citizen of the borough of Brooklyn, which until such consolidation was the city of Brooklyn. No papers in this action have been served upon me.

GEORGE FOSTER PEABODY.

Sworn to before me, this 1st day of May, 1901.

WM. MASON SMITH,
Notary Public, N. Y. Co.

[SEAL.]

29 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss.:*

Spencer Trask, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of fifteen years last past been continuously and now am a citizen and resident of Saratoga in the county of Saratoga, in the northern district of New York. I am neither a citizen nor a resident, and have never been a citizen or resident of the southern district of New York, or of the city of New York. No papers in this action have been served upon me.

SPENCER TRASK.

Sworn to before me, this 1st day of May, 1901.

WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

30 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss.:*

Charles J. Peabody, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of eight years last past been continuously and now am a citizen and resident of the State and district of New Jersey. I am not and never have been a citizen or resident of the southern district of New York. No papers in this action *had* been served upon me.

CHARLES J. PEABODY.

Sworn to before me, this 1st day of May, 1901.
WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

31 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, County of New York, } ss:

Acosta Nichols, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I am, and always have been, except for the year- 1895–96, a citizen and resident of the State of New York, and for the last four years have resided in the borough of Manhattan, in the southern district of New York. During the year- 1895–96, I resided in the State of New Jersey. No papers in this action have been served upon me.

ACOSTA NICHOLS.

Sworn to before me, this 1st day of May, 1901.
[SEAL.] THOMAS PLUNKETT,
Notary Public, Kings County, N. Y.

Certificate filed in New York county.

32 (Copies of the restraining order and bill for injunction were annexed to the foregoing affidavits and served on the defendants.) The order will be found at page 19 and the bill at page 2.

(Endorsed:) U. S. circuit court, southern district of New York,—Nathaniel W. Raphael ag'st Spencer Trask and others.—Affidavits of Edwin M. Bulkley and other defendants. Verified May 1st, 1901. Parsons, Shepard & Ogden, solicitors for defendants appearing for the purpose of opposing the motion only. 111 Broadway N. Y.—U. S. circuit court, Filed May 2, 1901, John A. Shields, clerk.

33 EXHIBIT A.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } Bill in Equity.

Bill of Complaint.

Charles L. Easton and Pierce, Critchlow & Barrette, complainant's solicitors.

U. S. circuit court, Filed Apr. 30, 1901.
JOHN A. SHIELDS, *Clerk.*

34 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } Bill in Equity.

To the judges of the circuit court of the United States for the district of Utah, in chancery sitting:

Complainant shows unto your honors that he is a citizen of the State of New Jersey; that the defendant, The Wasatch and Jordan Valley Railroad Company, is a corporation organized under the laws of the Territory, now State of Utah, and is a citizen of the State of Utah; that the defendant, The Rio Grande Western Railway Company is a corporation organized under the laws of the Territory, now State of Utah, and also under the laws of the
35 State of Colorado, as hereinafter described, and is a citizen of the State of Utah; that the defendant, The Union Trust Company of New York, as trustee, is a corporation organized under the laws of the State of New York, and is a citizen of the State of New York; that the amount in controversy in this suit exceeds ex-

clusive of costs and interest, the sum or value of two thousand dollars; that complainant brings this bill on his own behalf as an owner of 579, hereinafter described, $1,000 mortgage bonds, executed by the defendant, The Wasatch and Jordan Valley Railroad Company, and on behalf of all other of said bond holders similarly situated, who may choose to join as co-complainants and bear a *pro rata* portion of the expense of this suit; and complainant respectfully shows to your honors:

I. The defendant, The Wasatch & Jordan Valley Railroad Company, for the purpose of securing the payment of 1,200 of its mortgage bonds of the denomination of $1,000 each, dated May 1st, 1879, and payable May 1st, 1904, with interest at the rate of seven per cent. per annum, payable on the first day of November, and the first day of May in each year, upon the surrender of the respective interest coupons annexed to said bonds, conveyed to the defendant, The Union Trust Company of New York, as trustee, by its certain trust deed, also dated May 1st, 1879, copy of which trust deed is herewith attached, marked Exhibit "A" and made a part hereof, the whole of its then completed railroad line, situated in Salt Lake county in the Territory of Utah, commencing at a point in Bingham cañon, and running thence easterly by way of Sandy station on the Utah Southern railroad (now the Oergon Shore Line) to Alta in the Little Cotton Wood cañon, consisting of about 33 miles of main line and 11 1/2 miles of tramway railroad extensions of said
36 railroad westerly from a terminal point of said main line in said Bingham cañon, together with the franchise of said railroad, its rolling stock, stations, fixtures, lands and all income, tolls, rents, money and property thereof, which it then owned or might thereafter acquire; and which trust deed was recorded in the office of the recorder of said Salt Lake county, June 2d, 1879, in Book "H" of Mortgages, at page- 303 to 313 inclusive.

II. Said trust deed further provides that should default be made in the payment of said interest or any part thereof on any day whereon the same was made payable and said interest coupons having been presented, and payment of the interest thereon specified having been demanded, and such default of payment having continued for a period of six months after the said interest coupons shall have been due and payment been demanded, and upon a written demand by the holders of at least four hundred of said outstanding bonds, addressed to defendant, The Union Trust Company of New York as trustees aforesaid, then and there upon the principal of all the said bonds, which may be then outstanding, shall become immediately due and payable, and thereupon the defendant, said Union Trust Company, as trustees aforesaid, shall have the right to sell and dispose of all and singular said railroad, its franchise, and property, at public auction, by advertisement, in the manner as provided by said trust deed, and after deducting from the proceeds of said sale, the expenses of said sale, and all payments which have been made for taxes and assessments, and for liens existing prior to the lien of said trust deed, the remaining proceeds are to be applied to the pay-

ment of the interest which shall have been at the time accrued on all outstanding bonds *pro rata* until all such interest shall be paid, and afterwards to apply the remainder to the payment of the
37 principal of said bonds, *pro rata*, which bonds may be outstanding until such principal shall be paid, and if after payment of such principal and interest in full, there shall still remain a surplus, the same shall be paid to the defendant, The Wasatch & Jordan Valley Railroad Company, its successors or assigns.

III. Said trust deed further provides that said bonds are to be issued only at the rate of $20,000 for each completed mile of road, and that when so issued they may be sold hypothecated or otherwise disposed of by the officers and agents of the defendant, The Wasatch & Jordan Valley Railroad Company upon the most favorable terms to be obtained. Complainant further shows, as he is informed and believes, that immediately after the recording of said trust deed, there was issued and sold and has been outstanding ever since said sale, 884 of said bonds, of which complainant owns 579; and complainant is informed and believes, the holders of said 579 bonds demanded payment from the defendant, The Wasatch & Jordan Valley Railroad Company of the interest coupons attached to said 579 bonds, which fell due November 1st, 1899; and default has been made in the payment of the said last mentioned interest coupons attached to said 579 bonds, and such default has continued and said interest coupons due November 1st, 1899, have remained due and unpaid for a period of more than six months since the demand of payment aforesaid; that a written demand has also been made upon the defendant, the said Union Trust Company of New York, as said trustees aforesaid, by the holders of said 579 outstanding bonds, because of said default, to declare the principal of said 579 outstanding bonds immediately due and payable and to institute a suit to
38 foreclose said trust deed; and complainant shows that said trust company declines to so act as said trustee and also declines to bring suit of foreclosure of said trust deed, and because of the said refusal of the said trust company to act as aforesaid, and because the defendant, the said Wasatch & Jordan Valley Railroad Company, has failed to pay the said interest coupons demanded to be paid as aforesaid, and because more than six months has elapsed since said demand of payment was made, and said default has ever since continued and does now continue, complainant has elected to declare and does hereby declare the whole principal sum of each of said 579 bonds to be now due and payable; and complainant shows that there is now justly due on all of said 579 bonds, the sum of $579,000 of principal; and on certain interest coupons annexed to said 579 bonds, including interest to January 1st, 1901, there is due of interest, $825,976.83, making a total of principal and interest of $1,404,970.83, which amount complainant is entitled to have paid to him by the defendant, The Wasatch & Jordan Valley Railroad Company, or paid to him out of the proceeds of the sale of said railroad properties under a foreclosure proceeding of said trust deed.

IV. Complainant further shows upon information and belief, that the defendant, The Rio Grande Western Railway Company, is in possession of said railroad and claims to have some interest in or lien upon the same; but which possession, interest or lien, complainant avers upon information and belief, has accrued subsequent to complainant's right to a lien upon said railroad under said trust deed of May 1st, 1879; and that said possession, interest or lien has not destroyed complainant's right under said trust deed of May 1st, 1879, to have possession of said railway and its equipment taken from the said defendant, The Rio Grande Western Railway
39 Company, and sold under foreclosure proceedings for the non-payment of said 579 bonds and said interest thereon; and complainant further shows, that he for the first time discovered, in the month of July, 1898, that the defendant, The Rio Grande Western Railway Company acquired said possession, interest or lien through fraudulent proceedings, hereinafter described, and complainant avers upon information and belief, that said fraud and manner of acquiring possession of said railroad, ever since said bonds were issued, was kept concealed from the said Union Trust Company, as trustee, and from the holders of said outstanding bonds, and was unknown to this complainant, to either said trust company or said bond holders until discovered by complainant, in July, 1898. Complainant shows, upon information and belief, that the evidence, in a great part of said fraud, is contained in the books of account and financial statements of said railroad, and which books and statements were taken possession of by the officers and agents of the defendant, The Rio Grande Western Railway Company and the predecessors of said last named railroad about the time said possession of said railroad was acquired and ever since the year 1881, have been kept concealed and are now concealed by said officers and agents of said last named railroad company.

V. Complainant shows that on April 29th, 1879, the defendant, The Wasatch & Jordan Valley Railroad Company was formed under and in pursuance of the laws of the Territory of Utah, by the consolidation of a railroad company, also organized under the laws of the Territory of Utah, called the Bingham Cañon and Camp Floyd Railroad Company with a certain other railroad corporation, also organized under the laws of the Territory of Utah, and also called the Wasatch & Jordan Valley Railroad Company, and by uniting and consolidating the franchise, capital, stock, properties,
40 debts, assets and effects of said last named two railway companies; at the time of said consolidation, the said last named Wasatch & Jordan Valley Railroad Company owned that part of said railroad line, constituting a part of said mortgaged premises conveyed to said Union Trust Company, trustee aforesaid, commencing at Sandy station, on the Utah Southern railroad, and running thence in an easterly direction to Alta in the Little Cotton Wood cañon, situated in Salt Lake county, in the Territory, now State of Utah; and at the time of the said consolidation the said Bingham Cañon and Camp Floyd Railroad Company owned that part of said

railroad line, constituting that part of said mortgaged premises conveyed to said Union Trust Company, trustee aforesaid, beginning at said Sandy station, and running westerly to a point in Bingham cañon, described in said trust deed of May 1st, 1879, as "Bingham precinct;" and at the time of said consolidation there was a trust deed covering that part of said railroad line owned by the said old Wasatch & Jordan Valley Railroad Company, dated April 10, 1873, running to Augustus Kountz and William A. Hall as trustees, to secure the payment of 710 bonds of the said old Wasatch & Jordan Valley Railroad Company, of the denomination of $500 each, bearing date April 10th, 1873, and aggregating $355,000 of bonds, and payable May 1st, 1893, with interest at the rate of nine per cent. per annum, evidenced by interest coupons, payable on the first day of May and November in each year, up to and including the period of the maturity of said bonds on said May 1st, 1893, which trust deed to said Kountz and Hall, as trustees, was recorded June 21st, 1873, in Book "D" of Mortgages, page- 199 to 206 in the office of the recorder of Salt Lake county, in the Territory of Utah, and at the time of said consolidation there was also a trust deed by the said
Bingham Cañon (spelt in said mortgage "canyon") and
41 Camp Floyd Railroad Company to George T. M. Davis and
Charles W. Scofield, as trustees, dated June 3d, 1874, conveying to said last named persons as trustees that part of said consolidated railroad line commencing at said Sandy station, and running thence westerly to a point in said Bingham cañon, as aforesaid, for the purpose of securing the payment of 300 bonds of said Bingham Cañon and Camp Floyd Railroad Company of the denomination of $1,000 each, dated June 3d, 1874, and payable July 1st, 1894, with interest thereon at eight per cent. per annum, evidenced by interest coupons annexed to said bonds, payable July 1st, and January 1st, in each and every year, from the date of said bonds until the maturity of the same, on said July 1st, 1894; said trust deed to said Davis and Scofield, trustees, was recorded July 2d, 1874, in Book "E" of Mortgages, at pages 328 to 344, in the office of the recorder of said Salt Lake county, in said Territory of Utah. It was provided in said last mentioned trust deed, that said $300,000 of bonds should not cover, as a security for their payment, any extension or extensions of said Bingham Cañon (canyon) and Camp Floyd railroad from the then existing western terminal of said last mentioned railroad "at a point in Bingham cañon." Complainant is informed and believes that said last named railroad, after the recording of its said last mentioned mortgage, extended its said railroad line, and before said consolidation, in a westerly direction to the mining district in the mountains; the said western terminal point in said Bingham cañon, at that time, was located by the building of the depot at a point in said Bingham cañon, called Bingham City, and is the present western terminal of the main line of said steam road; said extensions from said western terminal consists of about 11½ miles of tramways; and complainant avers that said extensions became a part of said con-

42 solidated railroad line and then became the property of the defendant, The Wasatch & Jordan Valley Railroad Company, free from any incumbrance, except the lien created by said trust deed of May 1st, 1879, to the said Union Trust Company, trustee, as aforesaid. Complainant further shows, as he is informed and believes, that one George M. Young, claiming to act as trustee in place of the said Augustus Kountz and William A. Hall, trustees, in the said trust deed of April 10th, 1873, purported to sell under certain powers of sale, expressed in said trust deed, on the 29th day of December, 1881, at the Exchange salesrooms, at number 111 Broadway, in the city of New York, the railroad and equipment described in said last named trust deed to the Denver and Rio Grande Western Railway Company, a railroad corporation then existing under the laws of the Territory of Utah, for the alleged sum of $50,000 cash; that thereupon the said Young, in pursuance of said sale, executed a certain deed of conveyance, bearing date December 31st, 1881, but not acknowledged until June 15th, 1882, and recorded in the recorder's office of said Salt Lake county, in the Territory of Utah, July 27th, 1882, in Book "T" of Deeds and Transfers at pages 680 to 688, by which conveyance the said Young purported to convey said railroad line and its equipments, which railroad runs from said Sandy station to Alta, a distance of about 17 miles, to the said The Denver & Rio Grande Western Railway Company. Complainant further shows that said Charles W. Scofield and George T. M. Davis, as complainant is informed and believes, acting as said trustees under the said trust deed, made by the said Bingham Cañon and Camp Floyd Railroad Company, bearing date June 3d, 1874, also purported to sell to the said The Denver and Rio Grande Western Railway Company, under the power of sale expressed in said
43 last named trust deed at the said Exchange sales rooms, in New York city, on July 5th, 1881, the railroad line and equipment described in said mortgage of June 3d, 1874, for the alleged consideration of $300,000; that thereupon the said Scofield and Davis, in pursuance of said sale, executed a certain deed of conveyance, bearing date September 1st, 1881, but not acknowledged till October 7th, 1881, and recorded in the office of the recorder of Salt Lake county, in the then Territory of Utah, April 12th, 1882, in Book "S" of Deeds and Transfers, at pages 944 to 950, by which deed the said Scofield and Davis purported to convey as trustees aforesaid, said railroad property, consisting of about 16 miles of railroad line, commencing at said Sandy station and running in a westerly direction to a point in Bingham cañon, to the said The Denver and Rio Grande Western Railway Company; there was also included in said conveyance about 4 miles of spurs to the smelters in and about Sandy station; there was also included in said conveyance the equipment of said road.

VI. Complainant further shows upon information and belief that at or about the times of the recording of the said trustee's deeds to the said The Denver & Rio Grande Western Railway Company, said last named railroad took possession of said railroads, amount-

ing to 33 miles of main line and said 4 miles of spurs together with said equipment, and also took possession of said 11½ miles of tramway extension, from the western terminal, although no portion of said 11½ miles of extensions was embraced in said foreclosure sales, and from the time said last named railroad took possession it continued to use the same and receive the tolls and income thereof until a certain time before the first of July, 1889, when in accordance with and in pursuance of the laws of the State of Colorado, and the Territory of Utah, the said de-
44 fendant, The Rio Grande Western Railway Company, was organized and incorporated by the consolidation of the State Line and Denver Railway Company, a railroad corporation of the State of Colorado, and the said The Denver and Rio Grande Western Railway Company, a corporation of the Territory of Utah, as aforesaid, by uniting and consolidating the franchises, capital stock, properties, debts, assets and effects of the said two last named railway companies, whereupon the said defendant The Rio Grande Western Railway Company assumed possession, and has ever since been receiving the tolls and income of the same said railroads and equipment, including said 11 1/2 miles of extensions; complainant further shows, upon information and belief, that at the times when said Young and said Scofield and Davis pretending to act as trustees as aforesaid, made the said foreclosure sales as aforesaid, there was no actual default of certain interest coupons, upon which default the principal of the bonds *were* declared to be due, as set forth by said trustees in the said conveyances to the said The Denver and Rio Grande Western Railway Company of said railroads, but that the net earnings of the said respective railroads upon which said underlying mortgages were then existing, complainant shows, as he is informed and believes, were more than sufficient to have paid the said coupons, not only at the time when said default was declared but on the days when the foreclosure sales took place, upon which alleged default said foreclosures were made; and complainant charges upon information and belief that the attorneys, officers and agents of the said The Denver and Rio Grande Western Railway Company, at and before the said purchase, knew that there was sufficient net earnings of said railroads to pay said coupons, and yet for the purpose of depriving the holders of the said $579,000
45 of bonds and the other bondholders of their security upon said railroad property under the said trust deed of May 1st, 1879, and also as complainant is informed and believes, in order to enable the said The Denver and Rio Grande Western Railway Company to acquire possession of said railroad properties, its officers, agents and attorneys entered into a fraudulent scheme with the said trustee, Charles W. Scofield, who was then the president of the said consolidated road, and was then controlling the management and affairs of the said consolidated railroad, the defendant, The Wasatch & Jordan Valley Railroad Company, then owning said constituent railroads, and also controlled the disposition of the net earnings of the same; by which fraudulent scheme it was understood and

agreed by and between said agents, attorneys and officers of the said The Denver & Rio Grande Western Railway Company and the said Scofield, that the said default should be declared to exist when no default actually existed, for six months on said installments of said certain interest coupons on said outstanding bonds, secured by the said underlying mortgages, and the principal of said bonds be declared to be due by reason of said alleged default; by which fraudulent scheme it was further understood and agreed, as complainant is informed and believes, that the substitution by said Scofield of said Young, who was a clerk of said Scofield and an employee of said consolidated railroad, should be pretended to be made, when in fact no such substitution, as complainant is informed and believes, was ever legally made, as trustee in place of the said Kountz and Hall, and that it was further understood and agreed that said Young, by reason of said alleged default of certain six months' interest, coupons should declare the principal of the said bonds due, which bonds are described in the said trust deed made to said Kountz and Hall, though by their terms
46 said bonds would not fall due until May 1st, 1893; and thereupon it was further understood and agreed that said Young, as said pretending trustee, should advertise and sell said railroad at the said Exchange sales rooms, in the city of New York, under the powers of sale named in the trust deed, in which said Kountz and Hall were named as trustees; that the said Davis, though a joint trustee with said Scofield, as complainant is informed and believes, left the performance of the said trustees' duties to the said Scofield, who on his own and said Davis' behalf it was understood and agreed was to declare the principal of the said bonds due, because of an alleged six months' default in the payment of certain interest coupons upon the said outstanding bonds secured by the said trust deed in which the said Scofield and Davis were named s trustees; and that thereupon, as complainant is informed and believes, said Scofield and Davis, as aforesaid, were to advertise and sell the railroad properties covered by their said trust deed, by virtue of the powers of sale named in thier said trust deed, at the Exchange sales rooms, in the city of New York. Complainant further shows, upon information and belief, that the said foreclosure sales of the said railroad properties by the said Young and by the said Scofield and Davis, at the times and place and in the manner as aforesaid to the said The Denver & Rio Grande Western Railway Company, was all done in accordance with the aforesaid fraudulent scheme. Complainant further shows, upon information and belief, that it was agreed by all the parties to said fraudulent scheme that in consideration of said Scofield engineering said scheme, the said Scofield was to be allowed a one-third share in the profits of the purchase by the said The Denver & Rio Grande Western Railroad Company of both of the said railroad properties covered by the foreclosure of the
47 said underlying mortgages. Complainant further shows, as he is informed and believes, neither the said Scofield or Davis were present in said Exchange sales rooms, in the city of New York,

at the time of said purported foreclosure sale under the said trust deed, in which they were named as trustees, and that neither of them acting as trustees as aforesaid ever at any time offered for sale in said Exchange sales rooms, the said railroad property described in said trust deed, but that as complainant is informed and believes, the attorneys and agents of the said The Denver & Rio Grande Western Railway Company conducted all the proceedings of said sale and acted as auctioneers and also bid off said railroad property in the name of Charles F. Woerishoffer, who, at that time, was a director of said The Denver & Rio Grande Western Railway Company, and who acted for and on behalf of said last named railroad company in allowing the said attorneys to use his name to make said bid of $300,000 for said railroad, and who directed the said trustee's deed to be made conveying said railroad property as sold to said The Denver & Rio Grande Western Railway Company, on July 5th, 1881; and as complainant is informed and believes said attorneys prepared the said deed of said sale by the said Scofield and Davis to the Denver & Rio Grande Western Railway Company; and the said Scofield and Davis, as complainant is informed and believes, signed and executed said deed of sale so prepared by the said attorneys, of the Denver & Rio Grange Western Railway Company, without ever having received any portion, at any time, of the said $300,000 bid for said railroad properties. Complainant further shows that in the said underlying mortgage in which the said Charles W. Scofield and George T. M. Davis were named as trustees, dated June 3d, 1874, there is no authority given to the said trustees to delegate their authority to any person or
48 persons to offer said property for sale in the foreclosure of said mortgage, and as complainant is informed and believes, no express authority was ever given by said Scofield and Davis to any one to make said sales in their stead on July 5th, 1881; but, as complainant is informed and believes, the selling and bidding by the said attorneys, the drawing of said deed of conveyance and the execution of the same by said Scofield and Davis to the Denver & Rio Grande Western Railway Company was in accordance with the said fraudulent scheme in order to give possession to the Denver & Rio Grande Western Railway Company of said railroad property, without allowing the property to be sold at the highest market price at public auction. Complainant further shows, upon information and belief, that at the time of said fraudulent sale the said Bingham Cañon and Camp Floyd railroad was worth at least $1,000,000, and was paying a net sum of over six per cent. per annum of interest, upon said amount and that, as complainant is informed and believes, the said sum of $300,000 alleged to have been paid was an inadequate price for said railroad property, at the time of said pretended sale. Complainant further shows, upon information and belief, that the said old Wasatch & Jordan Valley railroad at the time of said fraudulent foreclosure sale by the said Young was worth at least the sum of $800,000 and was paying a net sum equal to over

six per cent. per annum of interest on said amount; and complainant charges upon information and belief, that the said sum of $50,000 cash, that was pretended to have been bid for said last named railroad at said fraudulent foreclosure sale was not paid, and that said sum was an inadequate price for said railroad. Complainant is informed and believes and so charges the fact to be, that the said $355,000 of bonds, which were outstanding and secured by the
49 said trust deed, under which said trust deed the sa-d Young pretended to act as said trustee in making said fraudulent foreclosure sale, were owned by various persons and corporations and that on the 27th of December, 1881, the day fixed by said Young in his advertisement to sell said railroad, the said Young and the said officers and attorneys of the Denver & Rio Grande Western Railway Company learned that certain of said bondholders, who were men of large means, would bid at said sale, for said railroad at least the sum of $355,000 about the amount of the said bonded indebtedness, thereupon, and at the request of the officers of the said The Denver & Rio Grande Western Railway Company, in order to prevent said threatened competition of bidders as said sale and prevent a higher bid than the said $50,000 cash, the alleged amount for which said road was sold the said Young, adjourned the said sale, without readvertising, until December 29th, 1881, at the same hour of the day and at the same place as named in the published advertisement notice of sale; that thereupon as complainant is informed and believes, the officers and attorneys of the said, The Denver & Rio Grande Western Railway Company, at once agreed with the said certain bondholders, that if they the said certain bondholders would not make competitive bids against the said bid of $50,000 of the said The Denver & Rio Grande Western Railway Company, at said adjourned foreclosure sale to be held on the said 29th day of December, 1881, it, the said The Denver & Rio Grande Western Railway Company, would give the said certain bondholders, who intended to bid for said railroad at said sale as aforesaid, bonds of an equal amount as those held by said named bondholders, secured by said trust deed to Scofield and Davis to be issued by the said, The Denver & Rio Grande Western Railway Company, and to be secured by a trust deed upon the said mortgaged
50 railroad property after the said Young should have sold the same to the said, The Denver & Rio Grande Western Railway Company, for the said proposed bid of $50,000 cash, thereupon as complainant is informed and believes, and so charges the fact to be that the said named bondholders accepted said offer of the said, The Denver & Rio Grande Western Railway Company and agreed not to bid at sale but consented that the said Young should and would sell said mortgaged property to the said, The Denver & Rio Grande Western Railway Company on the said 29th day of December, 1881, for the only bid that was made, viz: said sum of $50,000 cash. Complainant further shows upon information and belief, that there were a large number of bonds not held by said named bondholders, who did not know of the said arrangement to prevent said

competition of bidding and received only their *pro rata* proportion of the said cash bid of $50,000, and that they did not receive even their distributive share of said $50,000 till several years after said foreclosure sale, and not then until the holders of said bonds made threats of instituting a suit for an accounting against said Young. Complainant further charges, upon information and belief, that the said, The Denver & Rio Grande Western Railway Company, at the time it received said deeds of conveyance of said railroad properties under said mortgage foreclosure sales, knew that the said railroad properties were being purchased at said inadequate prices, because in the case of the Bingham Cañon & Camp Floyd railroad the said railroad property was known to the officers of said, The Denver & Rio Grande Western Railway Company, to be worth at least $1,000,000, and earning six per cent. net annual interest on that sum, and in the case of the old Wasatch & Jordan Valley railroad, the said railroad property was known to the officers of
51 said, The Denver & Rio Grande Western Railway Company to be worth at least $800,000, and earning net six per cent. per annum on that amount. Complainant further shows, upon information and belief that in the said consolidation of said, The Denver & Rio Grande Western Railway Company with the said Colorado Company, the same persons who controlled the said, The Denver & Rio Grande Western Railway Company, at once became the officers of the said consolidated company, the said defendant, The Rio Grande Western Railway Company, and said officers at the time of said consolidation had knowledge of the said fraudulent scheme entered into between the officers of said, The Denver & Rio Grande Western Railway Company and said Scofield, and knew that at the time of said foreclosure, there was sufficient money from the net earnings of said consolidated company or said constituent railroads forming the defendant, The Wasatch & Jordan Valley Railroad Company, to pay the interest on said underlying mortgages, and said officers knew that said alleged default of interest was for the purpose of declaring the principal of said outlying bonds due and payable before the said bonds were actually due by their terms in order to enable said trustees to sell said mortgaged premises to said, The Denver & Rio Grande Western Railway Company, in the manner as was carried out as hereinbefore stated. Complainant further shows, upon information and belief, that the amount of the tolls, rents and income, and the rental value of the said railroad properties taken possession of and used by the said, The Denver & Rio Grande Western Railway Company, and the defendant, The Rio Grande Western Railway Company exceeds the amount of principal and interest of the outstanding bonds secured by said underlying mortgages but complainant shows, that whatever amount shall be found to be due upon said underlying mortgages on an accounting of said bonds and of the use and occupation of said
52 railroad being first had, he hereby offers to pay for the protection of the security of his said 579 bonds, as provided by the terms of said trust deed of May 1st, 1879, can be done.

Wherefore, complainant prays that it be decreed:

1. That said foreclosure sales, under said underlying mortgages by said George M. Young, by said Charles W. Scofield and George T. M. Davis, as trustees, be declared illegal and be set aside, and complainant be allowed to redeem on his own behalf and on behalf of the other bondholders secured by the said trust deed of May 1st, 1879, the railroad properties so sold upon paying the amount found to be due upon an accounting being first had.

2. That an accounting be had by the defendant, The Rio Grande Western Railway Company of the use and occupancy of the said mortgaged premises and of the said 11½ miles of extensions, not only while in its own possession, but while in the possession — the Denver & Rio Grande Western Railway Company, and that the said defendant, The Rio Grande Western Railway Company be decreed to pay the amount such accounting shall show to be due for the use and occupation of said property.

3. That an account be taken of the amount due of principal and interest on the said bonds outstanding secured by said trust deed of May 1st, 1879, and the said premises be decreed to be sold according to law and the rules and practice of this court, should the said defendant, The Wasatch & Jordan Valley Railroad Company, fail to pay upon a day to be named by this court, the amount found to be due upon said accounting being had.

4. That the defendant The Wasatch & Jordan Valley Railroad Company and all persons claiming under said last named company, may be barred and foreclosed of all right, claim, lien and
53 equity of redemption in and to the said mortgaged premises described in the said trust deed of May 1st, 1879.

5. That in the foreclosure sale of the property described in said trust deed of May 1st, 1879, said bonds issued and outstanding under said trust deed may be ratably received in payment by any purchaser or purchasers of said described mortgaged property, provided sufficient amount in cash be paid by said purchaser or purchasers to pay the costs and expenses of this action.

6. That a receiver be appointed at once to take possession of and operate said railroad property described in said trust deeds, May 1st, 1879, during the pendency of this suit, and that a writ of injunction be issued out of this court restraining the defendant, The Rio Grande Western Railway Company, its officers and agents from in any manner interfering with the receiver or disposing of said railroad properties during the pendency of this suit.

7. That complainant may have such other or different relief as may be just and equitable.

8. That writs of subpœnas be issued out of and under the seal of this court against the said defendants, The Wasatch & Jordan Val-

ley Railroad Company, The Rio Grande Western Railway Company, and The Union Trust Company of New York, as trustee, commanding them and each of them, by a certain day, to appear before your honors, in the court aforesaid, and then and there answer the premises and abide the order and decree of this court.

NATHANIEL W. RAPHAEL,
By CHARLES L. EASTON,
Of 302 Broadway, New York City, and
PIERCE, CRITCHLOW & BARRETTE,
His Solicitors, of Salt Lake City.

E. B. CRITCHLOW, *Of Counsel.*

54 UNITED STATES OF AMERICA,
Southern District of New York, } ss:
County of New York,

Nathaniel W. Raphael, being first duly sworn, doth depose and say, that he is the complainant in the foregoing bill in equity, and that he has read the same and knows the contents thereof, and that the same is true, except as to such matters stated therein upon information and belief, and as to those matters he states he believes them to be true; and further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me, this 31st day of December 1900.

THEREON DAVIS,
[SEAL.] *Notary Public, N. Y. Co.*

55 EXHIBIT "A."

This indenture, made and entered into this first day of May in the year one thousand eight hundred and seventy-nine by and between the Wasatch and Jordan Valley Railroad Company, a railroad corporation created by and under the laws of the Territory of Utah, party hereto of the first part, and the Union Trust Company of New York, trustee party of the second part witnesseth, That whereas in pursuance of the power and authority duly vested in them, the board of directors of the Wasatch & Jordan Valley Railroad Company, at a meeting of said board, held at Salt Lake City, in the Territory of Utah, on the first day of May, in the year one thousand eight hundred and seventy-nine, unanimously resolved to issue and negotiate a series of twelve hundred bonds of the Wasatch & Jordan Valley Railroad Company of one thousand dollars each amounting *to* the aggregate to twelve hundred thousand dollars to bear date May first, in the year one thousand eight hundred and seventy-nine, payable in the city of New York, twenty-five years after the date thereof, to wit: on the first day of May, in the year one thousand nine hundred and four, with interest thereon

as hereafter specified at the rate of seven per cent. per annum from the date thereof, payable on the first day of November, one thousand eight hundred and seventy-nine and semi-annually thereafter on the first days of May and November in each year in the city of New York on presentation and surrender of the respective coupons or interest warrants annexed to said bonds, both principal and interest payable in United States gold coin at par, and it was further unanimously resolved that the said bonds should be signed by the president and treasurer of the said company and that the corporate seal of the said company should be affixed to the said bonds;
56 that said bonds should not become obligatory unless a certificate on said bond, as hereinafter mentioned should be signed by the trustees hereinbefore mentioned or by its legal successor; and that the said bonds should all be of like tenor and in the following form:

UNITED STATES OF AMERICA, }
Territory of Utah. }

United States gold coin, $1,000.

No. — The Wasatch & Jordan Valley Railroad Company of the Territory of Utah, acknowledged themselves to be indebted to —— —— of —— or bearer, for value received in the sum of one thousand dollars in gold coin of the United States of America, which sum they promise to pay to the holder hereof, in the city of New York, twenty-five years after the date hereof, to wit: on first day of May, in the year one thousand nine hundred and four with interest thereon at the rate of seven per cent. per annum from the date hereof, payable on the first day of November, eighteen hundred and seventy-nine, and semi annually thereafter on the first days of May and November in each year in the city of New York on presentation and surrender of the respective coupons or interest warrants hereto annexed; both principal and interest payable in United States gold coin at par, this bond is one of a series of twelve hundred bonds of one thousand dollars each, numbered from one to twelve hundred inclusive, amounting in the aggregate to twelve hundred thousand dollars, all of the same tenor and bearing even date herewith.

The payment of which said bonds and coupons is secured by a first mortgage, bearing even date with said bond duly executed by the said company to the Union Trust Company of New York as trustee for the holders of said bonds upon the whole of their railroad line from Bingham precinct and thence by way of Sandy station to Granite, thence to Alta in Little Cottonwood cañon and also
57 from Granite to Big Cottonwood cañon, all in Salt Lake county in said Territory, and all the rolling stock, stations, fixtures, lands, franchises and personal property thereof now owned or hereafter to be acquired and which mortgage is recorded in the office of the recorder of Salt Lake county in said Territory.

This bond shall not become obligatory unless the certificate hereunder written is signed by the trustee.

In witness whereof, the said Wasatch & Jordan Valley Railroad Company have by unanimous resolution of the board of directors caused their corporate seal to be hereunto affixed, and the same to be signed by their president and treasurer, this first day of May, A. D. one thousand eight hundred and seventy-nine.

[SEAL.] (Signed) CHARLES W. SCOFIELD, *President.*
(Signed) H. W. H. FITZGERALD, *Treasurer.*

We hereby certify that the foregoing bond is one of the series described in the mortgage above within referred to

(Signed) UNION TRUST CO., *Trustee.*

And that to each of said bonds there should be attached fifty coupons, or interest warrants, numbered respectively from one to fifty inclusive, in the following form with the proper dates and numbers inserted, commencing November first, eighteen hundred and seventy-nine and semi annually thereafter.

$1,000. No. —.

Wasatch & Jordan Valley Railroad Company.

For bond No. —.

Interest coupon for thirty-five dollars —— due —— Payable in the city of New York.

(Signed) I. G. KENNEDY, *Secretary.*

58 And whereas, at said meeting of the board of directors of said company, it was further unanimously resolved that for the purpose of securing the payment of bonds with the coupons attached thereto, to be issued as aforesaid, that a mortgage by the said company be executed, to be sealed with the corporate seal of the said company and signed by the president and treasurer to the Union Trust Company of New York as trustee for the holder of said bonds upon the whole of the railroad line of the said company from Bingham precinct, by way of Sandy station to Granite, thence to Alta, and also from Granite to Big Cottonwood, in Salt Lake county in said Territory, and all the rolling stock, stations, fixtures, land, franchises and personal property thereof, now used, or hereafter acquired for use, on said line, and that after the said mortgage had been executed by the said company, the same should be properly recorded in the county of Salt Lake, in said Territory.

And it was further resolved that the said bonds, when executed, should be sold, hypothecated, or otherwise disposed of by the duly authorized officers and agents of said company, upon the most favorable terms, to be obtained for the payment of the debts and liabilities incurred by the said company in the construction and equipment of the road only so fast as the road shall be completed and not exceeding twenty thousand dollars to each completed mile of road,

as by the resolution of the said board of direction will more fully appear.

Now therefore, this indenture witnesseth, that the Wasatch & Jordan Valley Railroad Company for the better securing the payment of the principal and interest of the said bonds, according to the tenor thereof, and of the coupons thereto attached, on the days and at the place therein and herein prescribed for the payment thereof, and also in consideration of the sum of one dollar in hand paid by the said party of the second part, the receipt
59 whereof is hereby acknowledged have granted, bargained, sold, aliened, conveyed and confirmed and by these presents do grant, bargain, sell, alien, convey and confirm unto the said party of the second part and its successor duly appointed for the execution of the trusts herein set forth, and to its successors forever the following property, part of which is now and part of which is hereafter to be constructed, purchased, acquired, held, possessed and owned by the said company, to wit:

The railroad line of said company, commencing at Bingham precinct and running thence in an easterly direction by way of Sandy station on the Utah Southern railroad to Granite, thence easterly to Alta in Little Cottonwood cañon, and also from Granite in a northerly direction to Big Cottonwood cañon, in the county of Salt Lake, in said Territory, including therein the roadway and track, together with all the superstructure, depot ground, station houses, watering places, work shops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments and all other property which is necessary, or ordinarily used in operating said railroad, and all rights and privileges of way or transit, which are now, or may be hereafter constructed, purchased, acquired, held, possessed or owned by said company, and pertaining to said line of railroad, and all corporate rights, privileges and franchise of said company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, income, issue and profits thereof, with all the right, title, interest, estate, property, possession, claim and demand in law and in equity of said party of the first part of, in and to the same and every part and parcel thereof.

60 To have and to hold, the above granted and described premises, property and franchises with the appurtenances, unto the said party of the second part, and to its successors duly appointed upon trust, nevertheless and to and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall become, or be from time to time holders of the said bonds, or any of them issued or to be issued by the party of the first part as aforesaid, provided always and these presents are upon the express conditions, that if the said party of the first part, or its successors shall well and truly pay or cause to be paid unto the holders from time to time of said bonds, and each and every of them the said sums of money, secured to be paid by said bonds, and the interest

coupons attached thereto at the place and times, and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, franchises and privileges herein and hereby granted and conveyed shall cease, determine and be void.

That until default shall have been made by the party of the first part in the payment of the principal or interest of said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by said party of the first part, it shall be permitted to possess, use, occupy, manage and operate the said railroad property, franchise and appurtenances, and to renew, replace and repair the same, and every part thereof, and take, receive and use the tolls, rents, issues, incomes and profits thereof; and apply the same to the payment of the current expenses of the road, and to the purchase of the necessary machinery and equipment, or dispose of the same in any manner not consistent with the indenture, and the board of directors of said company may likewise distribute, and any net incomes to stockholders, after paying the interest on any and all bonds which said company may owe.

61 But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months, from and after the time when the same should have been paid, according to the terms of said bonds, then the said party of the second part, or its successors in the said trust, by itself or its agents or servants in its behalf, may upon request of the holders of not less than four hundred of said bonds, on which the interest or principal shall so be and have remained in default as aforesaid, enter into and upon, and take possession of all, or in its, or in their, or his direction, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts and profits thereof, and out of the same pay.

First. The expenses of running and operating the same, including therein such reasonable compensations as it or they or he may allow to the several persons employed and engaged in running and superintendance of the same, and all taxes, assessments, charges or liens, having any preference to the lien of these presents, upon the said premises, or any part thereof; and a reasonable compensation to the party of the second part, or its successors for its, or their care, diligence and responsibility in the premises, and for the services of such attorneys and counsel as may have been, by it, or them employed, and

Second. The expenses of keeping the said road and appurtenances, the locomotives and the rolling stock thereof in good order and sufficient repairs to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof, and

Third. Pay at par as the same *with* suffice all interest on the

62 said bonds in the order in which such interest shall become due, ratably to the holder of the coupons evidencing the right to such interest; and after paying all interest, which shall have become due, to apply the said moneys to the payment of the principal as such of said bonds as may be at that time unpaid, ratably, and without discrimination or performance; and if after satisfaction thereof a surplus shall remain to pay over such surplus to the said company, its successors or assigns, or as any court of competent jurisdiction shall order and direct; or in case default shall be made as aforesaid and continue as aforesaid, it shall likewise be lawful for the said trustee, or its successors, after entry as aforesaid, or without entry, personally, or by its agents or attorneys, to sell and dispose of all and singular the railroad, tenor, rights, property, privileges, franchises, real and personal and other premises hereby conveyed or intended, so to be, with the appurtenances, or so much as may be necessary at public auction in New York city, at such time as the trustee, or its successors shall designate, and having first given notice of the place and of the time of such sale by advertisement, published not less than once a week, for six weeks successively, in two newspapers, published in the city of New York, and also in one newspaper published in Salt Lake City, in said Territory, and to adjourn the sale from time to time in its, or their discretion, and if so adjourned, to make the sale without further notice at the same time and place to which the same may be adjourned, and to make, execute and deliver to the purchaser or purchasers of said premises, good and sufficient deed or deeds, in fee simple, assignments or other transfers, good in law for the same and any part thereof, which sale made as aforesaid, shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all

63 other persons claiming, or to claim the said premises, or any part thereof, by from, through or under the said party of the first part, its successors or assigns; and after deducting from the proceeds of such sale, just allowance for all expenses thereof, including attorneys' fees, and all other expenses, advances and liabilities, which may have been made or incurred by the said trustee, in respect to the said lands or property, or any part or parcel thereof, or in operating or maintaining the said railroad or any part thereof, or in managing the business thereof, while in its, or their possession, and in preparing for and completing the sale aforesaid, or in the performance of any of the trusts herein contained, and all payments which may have been made by it, or them, for taxes or assessments and for charges or liens prior to the lien of these presents on said premises or any part thereof, together with a reasonable compensation for its, or their own services in the execution of this trust, to apply the remaining proceeds of sale to the payment of the interest which shall at the time have accrued on said bonds secured by these presents, or so many of them as shall have been issued by said party of the first part, and be then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds *pro rata*; until such

principal shall be paid; and if after payment of such principal and interest in full there shall remain any surplus, pay over such surplus to the said party of first part, its successors or assigns, or to such person or persons, as may be ordered or directed by any court of competent jurisdiction to receive the same, and the party of the first part do hereby declare and agree that the receipt of the trustee shall be a full and sufficient discharge to the purchaser or purchasers of the premises, to be sold as aforesaid, and that the said purchasers having paid the purchase money, shall not be liable to see to the application thereof, to or upon the trusts herein contained, or be answerable for any loss or misapplication or non-application of said purchase money or any part thereof, or be obliged to enquire into the necesssity, propriety or authority of, or for any such sale at the sale of the aforesaid property or any part thereof, whether made under and by virtue of the power hereby granted, or by judicial authority.

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The bonds issued by the party of the first part and hereby secured, with the past due and unpaid coupons, shall be ratably received in payment from any purchaser or purchasers by said trustee or its successors at the option of the holder thereof, and at any such sale the trustee may in its discretion bid for and purchase or cause to be bidden for and purchased the property so sold, or any part thereof, in behalf of the holder of the bonds secured by these presents, and then outstanding in the proportion of the respective interests of such bond holders at a reasonable price, if but a part of the property shall be sold, or if the whole be sold at a price not exceeding the whole amount of the bonds then outstanding with the accrued interest thereon.

In case default shall be made in payment of any half year's interest, on any of said bonds, at the time and in the manner provided in the coupons issued therewith, the said coupons having been presented and payment of the interest thereon specified having been demanded, and such default shall continue for the period of six months after the said coupons shall have been due and been demanded as aforesaid; then and thereupon, the principal of all the said bonds shall at the option or election of the trustee become immediately due and payable, anything in such bonds to the contrary notwithstanding.

But at any time the interest in arrear shall be paid a majority in the interest of the holders of said bonds may by an instrument in writing under their hands and seals instruct the trustee to declare the principal to be due, or to waive the right so to declare on such terms and conditions as such majority in interest shall deem proper, or may annul or reverse any declared election of the said trustee in that respect; provided, that no inaction of the trustee or bondholders shall extend to or be taken to affect any subsequent default, or impair the rights resulting therefrom. And the said party of the first part hereby agrees and covenants to and with the said party of the second part and its successors in said trust, that it will pay all ordinary and extraordinary taxes, assess-

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ments and other public burdens and charges which shall or may be imposed upon the property herein described, and hereby mortgaged and every part thereof, and the said party of the second part, or its successors in said trust or any one or more of the holders of said bonds, may, in case of the default of the said party of the first part, in this behalf, pay and discharge the same and any other lien or incumbrance upon said property, which may in any way, either in law or equity be or become in effect a charge or lien thereon, prior to these presents, or to which this mortgage may be subject or subordinate.

And for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per cent. per annum, and each payment, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid; and the same shall be payable by the said party of the first part, to said party of the second part, in trust for the party or parties paying the same upon demand, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided, and the said trustees shall also in its discretion, have full power to convey or realize upon the written request of the said Wasatch & Jordan Valley Railroad Company, any lands acquired or held for the purpose of stations, shops or other buildings.

And shall also have power to convey or release as aforesaid any lands or property which in its judgment shall not be necessary for use in connection with said railroad, or which may have been held for a supply of fuel, gravel or other materials, and also to convey or release as aforesaid, or like request, any lands not occupied by the track, which may have become disused by reason of a change in the location of the track, or any station house, depot or other adjacent building connected with said railroad, or any part thereof, and such lands not occupied by the track, and adjacent to such station house, depot, shop or other building, as the said company may deem expedient to disuse or abandon by reason of such change, and to consent to any such change or to such other changes in the location of the track or depot or other buildings as in its judgment have become expedient, and to make and deliver the instrument or conveyance necessary or proper to carry the same into effect. But any lands which may be acquired for permanent use in substitution for those so released shall be conveyed to the said trustee upon the trusts of these presents, and the trustee shall also have full power to allow the said company from time to time, to dispose of according to its discretion such portions of its equipment, machinery and implements at any time held or acquired for the use of the said railroad as may become unfit for use, or for any reason desirable to be changed, replacing the same by others of at least equal value, which shall be conveyed by the said company to the said trustee; or to be otherwise made subject to the lien and operation of these presents.

It shall be the duty of the trustee to exercise the power of entry or the power of sale, hereby granted or both, or to proceed by suit or suits at law, or in equity, to enforce the rights of the bond-
67 holders, in case of default herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition of the bondholders herein required, as follows:

First. If the default be in the non-payment of interest or principal of any of the said bonds, upon the written requisition of any holder or holders, of not less than four hundred of said bonds and a proper indemnification of such holder or holders to the trustee against the cost and expenses to be incurred, it shall be the duty of the trustee to enforce the rights of the bondholders under these presents by entry or sale under the power herein contained or both, or by suit or suits at law, or in equity, as it, being advised by counsel learned in the law, shall deem most expedient for the interest of the bondholders, or

Second. If the default be in the omission of any act or thing required by these presents, for further assuring the title of the trustee to any property or franchise now possessed or hereafter acquired or in the omission to comply with any provision of these presents, to be observed, kept, or performed by the said company, then, and in either of such cases the trustees may in its discretion enforce and upon the requisition as aforesaid of a majority in interest, of the said holders of the bonds hereby secured, it shall be its duty to enforce the rights of the bondholders, by reason of such default the said trustee, being indemnified by the bondholders against costs and expenses, subject to the power hereby declared in any of the above cases.

If a majority in interest of the holders of the said bonds by requisition in writing under their hands and seals, to instruct the said trustee to waive such default upon the actual payment of the interest in arrear with the interest thereon or other compliance with the provisions herein contained, and payment of the expenses
68 incurred by reason of such default, or adequate indemnity as aforesaid, to enforce the rights of the bondholders by reason thereof, provided that no action of the said trustee or bondholders or both, in waiving such default or otherwise, shall extend to or be deemed to affect, any subsequent default or to impair the rights resulting therefrom.

It is mutually agreed and understood that said trustees shall be entitled to just compensation for all services which it may hereafter render in the execution of this trust, to be paid by said company or out of the income of the property, and for that purpose may at any time apply to the courts, without notice to any person except the said party of the first part, their successors or assigns, that said trustee or any successor may resign or discharge itself or himself of the trust hereby created by notice in writing to the said company; three months before such resignation shall take effect or such shorter notice as said company shall accept a sufficient notice, and upon due execution of the conveyances hereinafter required. And in case

the said trustee or any trustee hereafter appointed shall cease to exist, die, resign, or become incapable of acting, or unfit to act, in the said trust, a successor to such shall be appointed by the said company with the written consent of a majority in interest of the said bondholders.

And the trustee so appointed shall thereupon be vested with all the powers, authorities and estate granted to or conferred upon the party of the second part by these presents, and all the rights and interests requisite to enable him to execute the purpose of this trust without any further assurance or conveyance.

And upon the resignation or removal by any court of competent jurisdiction of any trustee, or an appointment in its or his place in pursuance of these presents, all its or his power and authority
69 by virtue hereof shall cease, and all the estate, right, title and interest in the said premises of any trustee so resigning or being removed, shall wholly cease and determine.

But the said trustee so resigning or being removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee and upon the trusts herein expressed, all the property, rights and franchises which may be at that time held upon the said trusts; provided nevertheless, and it is hereby declared and agreed that, in case it shall at any time hereafter prove impracticable after reasonable exertion, to appoint in the manner hereinbefore provided, a successor to fill any vacancy which may occur in said trust application, in behalf of the holders of the bonds secured hereby may be made by the holders of such bonds to the amount of one hundred thousand dollars to the district court for the third judicial district of said Territory, in which district the said railroad is situated, or to any other court of competent jurisdiction, for the appointment of a new trustee. And the trustee or trustees when so appointed, shall become vested with all the powers, authorities, and estate granted to or conferred upon the party of the second part by these presents.

And the said party of the first part for itself and its successors and assigns, in consideration of the premises and of one dollar to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with the said party of the second part and its successors and assigns, that whenever and as often as the said party of the first part, its successors and assigns, shall acquire any lands, equipments or other property or thing of whatever name or nature, for use in connection with said railroad between the points aforesaid or any part
70 thereof, the said party of the first part, its successors and assigns shall and will acquire, possess, and hold the same and every part and parcel thereof upon and subject to the trust of this indenture, until conveyance thereof shall be duly made and delivered to the said party of the second part or its successors in said trust, pursuant to the next mentioned covenant.

And the said party of the first part, for itself, its successors and assigns, for the consideration aforesaid, further covenants and agrees to and with the said party of the second part and its successors and assigns, that the said party of the first part, its successors and assigns, shall and will from time to time and at the times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge and deliver all such further deeds conveyances and assurances in the law for the better assuring unto the said party of the second part and its successors in said trust upon the trusts herein expressed the said railroad between the points aforesaid, together with all the appurtenances and property hereinbefore mentioned and appertaining thereto, and to which the said company are or may hereafter for any reason, become entitled, or which it or its successors or assigns may in any manner acquire for use between the points aforesaid, as by the said trustee or its counsel learned in the law, shall be reasonably advised or required.

And it is also mutually understood and agreed between the parties hereto that the said party of the second part and its successors in said trust shall be accountable, liable or responsible for reasonable care and diligence only in the performance of the trusts hereby created.

And in the management of the said estate and property in like manner as a *bailee* without reward, and shall not be liable, accountable or responsible for the acts of any agent, depositary, or substitute employed by it or them, when such agent, depositary or
71 substitute shall have been selected with reasonable discretion.

And the said party of the second part hereby accepts the trusts created and declared by this indenture, and agree- to discharge the same pursuant to the provisions in that behalf therein contained.

In witness whereof, the said parties have caused their respective corporate seal- to be hereto affixed, and these presents to be signed by the president and treasurer respectively of said railroad company and the president and secretary of said Union Trust Company, the day and year first above written.

[CORPORATE SEAL.] WASATCH & JORDAN VALLEY RAIL ROAD CO.
C. W. SCOFIELD, *President.*
H. W. FITZ GERALD, *Treasurer.*

[CORPORATE SEAL.] UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

Attest: JAS. H. OGILVIE.

Signed, sealed and delivered in presence of
WILLIAM H. CLARKSON.
HERMAN SULING.

CITY AND COUNTY OF NEW YORK, } ss:
State of New York, }

Be it remembered that on this 27th day of May, A. D. 1879, before me, William H. Clarkson, a notary public of the State of New York, in and for the county of New York, residing in the said city of New York, personally appeared C. W. Scofield, the president of the Wasatch and Jordan Valley Rail Road Company, and H. W. H. Fitz Gerald, the treasurer of the same company, and, being by me duly sworn, they did depose and say that they are the above
72 described officers of the said company; that the seal affixed to the foregoing instrument purporting to be the corporate seal of said company is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and treasurer of said company respectively;

And the said C. W. Scofield and H. W. H. Fitz Gerald, who are personally known to me to be the individuals described in and who executed the foregoing instrument, also acknowledged to me that they executed the same freely and voluntarily, and that the same was their free act and deed as the president and treasurer respectively of said company and the free act and deed of the said company.

And on the same day, before me also, personally appeared Edward King, the president of the Union Trust Company of New York, and James H. Ogilvie, the secretary of the same company, also being by me duly sworn, they did depose and say that they are the above described officers of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, is such corporate seal; that it was affixed thereto by order of the board of trustees of the said company, and that they signed their names thereto by the like order as the president and secretary of the said company. And the said Edward King and James H. Ogilvie, who are personally known to me to be the individuals described in, and who executed the foregoing instrument, also acknowledged to me that they executed the same freely and voluntarily, and that the same was their free act and deed and the free act and deed of the said company.

73 In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of *of* May, A. D. 1879.

[SEAL.] WILLIAM H. CLARKSON,
Notary Public for New York County, N. Y.,
117 *Broadway, N. Y. City.*

Recorded June 2nd, 1879, at 10.25 a. m.

Certificate.

STATE OF UTAH, } ss:
County of Salt Lake, }

I, James C. Jensen, county recorder in and for said county, duly qualified, commissioned and acting, do hereby certify that the above

and foregoing instrument of writing, consisting of fifteen sheets, numbered from one to fifteen inclusively, is a full, true and correct copy of that certain mortgage, wherein the Wasatch & Jordan Valley Railroad Company appears as party of the first part, and the Union Trust Company of New York, trustee, appears as party of the second part, as the same appears of record in Book "H" of Mortgages, at pages 303 to 313 inclusive, records of Salt Lake county, Utah.

Witness my hand and official seal at Salt Lake City, Utah, this twentieth (20th) day of October, A. D., 1899.

[SEAL.] J. C. JENSON,
County Recorder.

10 ct. rev. stamp.
I. J. P. & E. H. J.

74 EXHIBIT B.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD Company, The Rio Grande Western Railway Company, Union Trust Company of New York, Trustee, and Others, Defendants. } In Equity. No. 394.

Separate Answer of the Rio Grande Western Railway Company.

Bennett, Howat, Sutherland & Van Cott, solicitors for the defendant The Rio Grande Western Railway Company.
Robert Harkness, of counsel.

U. S. circuit court, Filed Ap'l 30–1901.
JOHN A. SHIELDS, *Clerk.*

75 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
versus
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } In Equity.

Separate Answer of the Rio Grande Western Railway Company.

The defendant, The Rio Grande Western Railway Company, saving and reserving to itself all manner of benefit or advantage of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections of the bill of complaint herein, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, separately answering, says:

It admits that prior to April, 1879, there existed a railroad corporation organized under the laws of the Territory of Utah in the name Wasatch & Jordan Valley Railroad Company, and that it owned a certain line of railroad and tramway in Salt Lake county, Utah, more particularly hereinafter described. And this defendant says, upon information and belief, that said railroad company was organized on or about the 26th day of October, 1872, and from the time of its organization had franchises and powers to construct and operate lines of railroad and tramway on and over routes as follows:

76 From a point at or near Sandy station on the (then) Utah Southern railroad, easterly by the most desirable route to the mouth of Little Cottonwood cañon, thence easterly through said cañon to some convenient terminal point, all in Salt Lake county, Utah, and the length of the contemplated railroad being thirty (30) miles, more or less;

And that in, or prior to the year 1873, the said railroad company constructed and commenced operating a line of narrow gauge steam power railroad from the initial point of said routes at Sandy on the Utah Southern railway (now known as the Oregon Short Line railroad) easterly to Wasatch station, above the mouth of Little Cottonwood cañon, a distance of eight miles, and thence constructed in 1875 and operated a railroad tramway up the cañon and to or near to Alta in said cañon a further distance of about eight miles, making a total length of railroad and railroad tramway of about sixteen (16) miles; and that no further extension of or addition to the length of said railroad or railroad tramway has ever been made.

This defendant admits and on information and belief alleges that the said Wasatch & Jordan Valley Railroad Company (which for distinction and brevity will be hereinafter referred to as the "old

Wasatch Company") by its trust deed dated April 10th, 1873, conveyed by way of mortgage to Augustus Kountze and Wm. A. Hall, as trustees, its aforesaid line of railroad and tramway to secure the payment of seven hundred and ten (710) bonds of the old Wasatch Company of the denomination of five hundred dollars ($500) each, bearing date April 10th, 1873, and aggregating three hundred and fifty-five thousand dollars ($355,000) of bonds payable May 1st, 1893, with interest at the rate of nine per cent. per annum, which mortgage was duly recorded on 21st June, 1873, in the office of the recorder of Salt Lake county. And on information and belief this defendant further alleges that said trust deed conveyed to said trustees jointly and not in common, and to their survivors and successors and successor in the trusts appointed as in said trust deed pro-
77 vided, and to his or their assigns, all the franchises and line of railroad and tramway of said old Wasatch Company, then constructed or to be thereafter constructed or acquired, with all rights of way and property, real or personal, used or for use thereon or appurtenant thereto; that of said series of bonds the said old Wasatch Company, issued and negotiated six hundred and ninety (690) bonds, each for the principal sum of five hundred dollars ($500); and that no larger number of bonds was ever issued or negotiated or the payment thereof secured by said deed of trust.

This defendant admits the alleged organization and existence of the Bingham Cañon & Camp Floyd Railway Company, and that it owned a line of railroad as hereinafter described.

And this defendant alleges on information and belief that said last named company was organized on or about the 10th day of September, 1872, with franchises and powers to construct, own and operate a line of railroad from Sandy station on the line of the Utah Southern (now Oregon Short Line) railroad westerly through Bingham cañon in Salt Lake county, and through or near to Ophir City to the town of Lewiston in the Camp Floyd mining district, Utah Territory, a distance of about thirty-five miles.

And on information and belief this defendant says, that in the years 1872 and 1873 the said company surveyed for, located, constructed and commenced operating a line of steam narrow gauge railroad, from its terminus at Sandy, westerly to and up the Bingham cañon for a distance of sixteen and thirteen-one-hundredths ($16\frac{13}{100}$) miles and in 1875, constructed a railroad tramway, in extension of its steam power road for the further distance of two and seventy-six-one-hundredths ($2\frac{76}{100}$) miles and commenced the operation of the same.

This defendant admits and on information and belief alleges the execution, delivery and record of the trust deed stated in the bill of complaint, by the said Bingham Cañon & Camp Floyd Railway Company to Charles W. Scofield and George T. M. Davis as trustees, dated June 3rd, 1874, for the purpose, which was therein
78 stated, of securing the payment of three hundred bonds of said last mentioned company of the denomination of one thousand dollars ($1,000) each, dated June 3rd, 1874, and payable

July 1st, 1894, with interest thereon at eight (8) per cent. per annum, payable July 1st and January 1st in each and every year from the date of said bonds.

And on information and belief this defendant further alleges that the whole number of bonds secured thereby, that is to say, three hundred thousand dollars ($300,000) in par value, was issued and negotiated by said company; that said trust deed conveyed all the line of railroad and railroad tramway constructed or to be constructed or acquired by the company with the franchise therefor, and all appurtenances and property, real or personal, connected therewith, for a distance of twenty miles from Sandy aforesaid, to and up the Bingham cañon; and that the said trust deed did not cover the franchise or any length of said railroad which might be constructed in extension for a greater distance than twenty (20) miles from Sandy. But this defendant denies that said trust deed provided that the three hundred thousand dollars ($300,000) in bonds should not cover extensions beyond the terminal of the then constructed railroad and within twenty (20) miles from Sandy aforesaid.

And on information and belief this defendant denies that said Bingham Cañon & Camp Floyd Company after the execution, or after the recording of said trust deed, or before the alleged consolidation, or at any time, extended its said railroad line westerly from the location of the depot building in Bingham for a distance of eleven and one-half (11½) miles of tramway, or for any distance more than two and seventy-six one hundredths ($2\frac{76}{100}$) miles, or that the western terminal of the said lines, at the time it made its trust deed was at the station building in Bingham, or that said company made any extension of railroad or tramway westerly after about the year 1875, or that the extensions alleged in the bill of complaint, or any extensions of railroad or tramway made by said company after the
79 execution of its trust deed, became a part of the alleged consolidated railroad or of the railroad of said Bingham Cañon & Camp Floyd Railway Company free from the lien of its trust deed of June 3rd, 1874.

And this defendant further answering avers, upon information and belief:

That the Denver & Rio Grande Western Railway Company mentioned in the bill of complaint, was organized under the laws of the Territory of Utah on or about the 21st day of July, 1881, by the consolidation of various Utah railway companies, and had franchises and powers to acquire, construct, own and operate various lines of railroad, the routes of which covered a large mileage, and that, by amendment to its articles of incorporation, made March 2nd, 1882, and filed April 11th, 1882, it acquired franchises and powers to acquire, construct, own and operate lines of railroad as follows:

(*a.*) A branch line of railroad beginning at a point on the line of route of the company's railway between Salt Lake City and Draperville, and about eleven miles southerly from Salt Lake City, thence running westerly to and through Bingham cañon to a point at or near the Jordan mine in the West Mountain mining district, a dis-

tance of about twenty miles, all in Salt Lake county, Territory of Utah.

(*b.*) A branch line of railway beginning at a point on the line of route of the company's railway between Salt Lake City and Draperville, about twelve miles southerly from Salt Lake City, thence running easterly to and through Little Cottonwood cañon to a point at or near Alta City, a distance of about twenty miles, with a branch from a point at or near the mouth of Little Cottonwood cañon to and through Big Cottonwood cañon a further distance of about fifteen miles, all in Salt Lake county, Territory of Utah.

And this defendant further alleges upon information and belief that the point of beginning of both lines last described is a point on this defendant's main line called Bingham junction and by the line of railroad about two miles westerly from Sandy and the former junction of the Bingham Cañon & Camp Floyd railroad with
80 the Utah Southern railroad; that line (*a*) above described covers the line of route of the Bingham Cañon & Camp Floyd railroad described in its trust deed of June 3rd, 1874, and an extension thereof of about two miles at the westerly end, but omits from the line described in said trust deed of June 3rd, 1874, about two miles at the easterly end from Bingham junction to Sandy and a connection with the old Utah Southern railroad; that the line and route (*b*) above described covers and includes the line of route of the old Wasatch Company, as described in its trust deed of April 10th, 1873, and about two miles westerly from Sandy to Bingham junction, and being the easterly two miles of the line described in the trust deed of the Bingham Cañon & Camp Floyd railroad of June 3rd, 1874; and that said route (*b*) also includes a line branching from the old Wasatch Company's route and extending to Big Cottonwood cañon which has never been constructed.

And this defendant on information and belief further avers that prior to the organization of the Denver & Rio Grande Western Railway Co. and ever since there had and has existed a corporation organized under the laws of Colorado, by the name of "the Rio Grande Western Construction Company," and with franchises and powers to acquire, construct, equip and incidentally operate until sold, lines of railroad in Colorado, Utah and elsewhere, and to lease, sell or otherwise dispose of the same to railroad companies; that said construction company prior to the organization of the Denver & Rio Grande Western Railway Company had contracted with and was doing construction work for the constituent railroad companies by the consolidation of which said last named railway company was organized, for which the construction company was to be paid in bonds and stock of said companies, and upon its organization the Denver & Rio Grande Western Railway Company assumed the contracts and obligations of such constituent companies; that after its organization the said The Denver & Rio Grande Western Railway Company, being without means to construct its lines of railroad otherwise than by the use of bonds, the payment of which should be secured by a lien on its railroad, provided for an issue of

81 bonds to pay the assumed obligations of its constituent companies, and to construct and equip its lines of railroad,—the bonds to be payable to bearer, issued at the rate of sixteen thousand dollars ($16,000) per mile of constructed railroad, to bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and both principal and interest payable in gold coin; that to secure the payment of the said bonds, the said company, by trust deed dated Aug. 1, 1881, conveyed to Louis H. Meyer, as trustee, all its franchises and authorized lines of railroad acquired or constructed or which should be acquired or constructed and all the appurtenances thereto then or thereafter owned or acquired, including rights of way, stations and buildings, and all property real and personal, at any time connected with or for use with said railroad lines; that said company from time to time and prior to the organization of this defendant, issued and sold negotiable bonds so secured; that the same were purchased in good faith and held by numerous persons and parties in the United States and Europe; that at the time of the organization of this defendant the amount so issued and sold including funded unpaid interest coupons, amounted to six million nine hundred thousand — ($6,900,000); and that with the avails of said bonds and also by use of its capital stock, sold with the bonds or otherwise, the said company had acquired or constructed and owned a large mileage of narrow gauge railroad, with the appurtenances.

And on information and belief this defendant avers, that soon after the organization of the Denver & Rio Grande Western Railway Company, and at the same time that it executed its said trust deed to secure said bonds, it made an agreement dated August 1st, 1881, with the Rio Grande Western Construction Company, by which the latter mainly in consideration of sixteen thousand dollars ($16,000) per mile in said bonds of said railway company, to be paid as well in respect to mileage constructed or in process of construction for said constituent companies, as for the mileage thereafter constructed,

82 agreed to procure all rights of way, and grounds required, make surveys for and construct and equip in good condition and ready for operation, and deliver to the said railway company in sections, all the lines of railroad the construction of which had been made or commenced for said constituent companies, and all lines of railroad designated by the railway company for construction; and that a copy of said agreement is annexed hereto, made a part of this answer, marked Exhibit "A" and referred to as fully as if incorporated herein.

And this defendant further alleges upon information and belief that the Denver & Rio Grande Western Railway Company in some way and under said contract indicated to the construction company that it would accept lines of railroad acquired and completed in accordance with said contract, on and over the routes aforesaid, one commencing at Bingham junction and extending westerly to and up Bingham cañon, a length of twenty miles, more or less, and one commencing at Bingham junction aforesaid and running easterly to

Wasatch, near the mouth of Little Cottonwood cañon, and thence up the cañon to Alta, a distance of eighteen miles more or less, all in Salt Lake county, Utah; that said construction company, with a view to acquire, complete, put in the good condition required, and deliver to the said railroad company a line of railroad on and over said routes, proceeded to arrange for the purchase, and purchased, the lines of railroad included in and sold under the trust deed of the Bingham Cañon & Camp Floyd Railway Company dated June 3rd, 1874, and sold under the trust deed of the old Wasatch Company, dated April 10, 1873; that the railroad of the old Wasatch Company was purchased at the foreclosure sale thereof by one William M. Spackman who was, and therein acted as, an agent of the Rio Grande Western Construction Company; that the railroad of the Bingham Cañon and Camp Floyd Railway Company was purchased at the foreclosure sale of said railroad by one Charles F. Woerishoffer, who thereafter transferred and sold to the said construction company all of his rights under his said bid; that the deeds, though made
83 directly to the Denver & Rio Grande Western Company, were so made to avoid a second transfer, and by the direction of the construction company, and with a view to further and carry out the performance of its contract dated August 1st 1881; that said deed of the old Wasatch Company's line was not made or delivered to the Denver & Rio Grande Western Railway Company until after June 15th, 1882, or the deed of the Bingham Cañon & Camp Floyd Railway Company delivered or accepted until the 11th or 12th day of April, 1882, and that upon the delivery of said deeds the Denver & Rio Grande Western Railway Company paid the said construction company as provided in their contract, the agreed mileage consideration in bonds and stock, and became a purchaser in good faith and without any notice or knowledge of the alleged or any frauds, irregularities or defects in the sales, or as inducements to the sales.

And this defendant admitting the sale of the mortgaged railroad of the old Wasatch Company by George M. Young, as trustee, at or about the time and for the amount alleged, and the deed by the said trustee, denies on information and belief that the sale was made to the Denver & Rio Grande Western Railway Company, or to any one as an agent or officer of said company; but this defendant on information and belief alleges that the bid was made by and the sale was ostensibly made to one William M. Spackman, who was and therein acted solely as the agent of the Rio Grande Western Construction Company, though said Spackman was at that time also treasurer of the Denver & Rio Grande Western Railway Company, and that said purchase was made by the said construction company, and afterwards by its direction the deed was made as hereinbefore set forth.

This defendant admits the sale of the mortgaged railroad of the Bingham Cañon & Camp Floyd Railway Co. by trustees at or about the time and place and for the bid and under the trust deed stated in the bill of complaint; but denies that said sale purported to be made or was made to the Denver & Rio Grande Western Railway

Company, and avers upon information and belief that the sale
84 was made to one Charles F. Woerishoffer, acting in his own right; that he then owned and held the said three hundred (300) bonds secured by the said trust deed of the Bingham Cañon & Camp Floyd Railway Company, and that the said Woerishoffer's purchase and bid and the bonds so held by him were after the formal sale but before its consummation by deed, purchased from him and the full price therefor in good faith paid to him by said construction company, and that at its request, and in furtherance of its contract with the Denver & Rio Grande Western Railway Company said bid was transferred to the last named company, and that on or about April 11th, 1882, the deed of the trustees was delivered in behalf of the said construction company to the said railway company as above stated.

And this defendant denies that said deed conveyed only about sixteen (16) miles of railroad, or included as part of the mileage conveyed about four (4) miles of spurs at Sandy; but defendant avers that said deed conveyed all the interest of said Bingham Cañon & Camp Floyd Railway Company, in twenty (20) miles of railroad westerly from Sandy, with all spurs and other appurtenances.

This defendant admits that in or about August, 1882, being soon after the delivery of said deeds to the Denver & Rio Grande Western Railway Company, it received and took from the said construction company (or from the receiver then holding the same for or subject to accounting therefor to the construction company) the possession of the railroads and railroad tramways conveyed, so far as there were constructed railroads or tramways on the lines purporting to be conveyed, and remained in possession as owner during the existence of the said Denver and Rio Grande Western Company; but this defendant denies that the Denver & Rio Grande Western Railway Company took possession of eleven and one-half (11½) miles or any length of tramway extension from the western terminal, or of any tramway extension beyond twenty (20) miles from Sandy, or of any tramway not included in the trust deeds; or that the lines of steam power railroad of which it took possession amounted to about
85 thirty-three (33) miles, or more than twenty-four (24) miles; or that it took possession of four (4) miles of spurs at or near Sandy, or any spurs not appurtenant to the main lines and parts thereof.

And this defendant alleges and shows that from and after the time the Denver & Rio Grande Western Railway Company took possession of said railroads as aforesaid, and until this defendant company was organized and took possession thereof as hereinafter alleged, the Denver & Rio Grande Western Railway Company had and held as owner, under claim of title exclusive of any other right, the exclusive, open, uninterrupted, peaceable and adverse possession of all said railroads and tramways included in the convenances aforesaid, and of all the said line of railroad and tramway from Sandy westerly to and up Bingham cañon for a distance of twenty (20) miles from Sandy, and of all the line of railroad and tramway,

from Sandy aforesaid to and up Little Cottonwood cañon to Alta, with the spurs, side tracks and all appurtenances, and all property, real and personal pertaining thereto, and that, during its possession it paid all taxes and assessments thereon, expended large sums of money in improving said lines and made or caused to be made in the exercise of its own franchises some branches from and extensions of said tramway to mines in Bingham cañon.

This defendant admits its organization as a consolidated railroad company, substantially as set out in the bill of complaint, and further alleges and shows, upon information and belief, that it was organized on or about May 16th, 1889, and took all the franchises and property of its constituent companies, including the lines of railroad and tramway easterly and westerly from Sandy, but denies there existed or it took possession of eleven and one-half (11½) miles of extension or any extensions except as stated. This defendant further alleges upon its information and belief that by its agreement of organization as well as by force of law, this defendant assumed and agreed to pay all the debts and obligations of said constituent companies, and also assumed their capital stock obligations and cancelled the stock of the constituent companies by exchanging its own
86 therefor; that the Denver & Rio Grande Western Railway Company, under its aforesaid trust deed to Louis H. Meyer, had, prior to May 15th, 1889, issued and negotiated bonds payable to bearer to the amount of six million nine hundred thousand dollars ($6,900,000), and at the rate of about eighteen thousand five hundred dollars ($18,500) per mile for its constructed railroads, and was also indebted on interest coupons and certificates funding overdue coupons; that although the issue of bonds was in excess of the amount per mile contemplated by the trust deed, all said obligations were debts of that company, and as such were on that date assumed by this defendant; that the said trust deed was then a lien on the property in the hands of this defendant and on the railroads and tramways easterly and westerly from Sandy; that when this defendant acquired, as it did on or about 16th May, 1889, possession of the property of the constituent companies all the constructed lines were narrow gauge, in poor condition for operation, the track made with light rails and the operated lines consisting of about three hundred and seventy-three (373) miles; that it was necessary for the successful operation and to the interchange of traffic with connecting railroads that the railroads constructed and to be constructed under the franchises of the company should be made broad or standard gauge and that a large expense should be incurred in widening and improving the road bed, taking out curves, improving the alignment and in putting on a standard gauge track of heavy steel rails; that this defendant being without means to pay the assumed indebtedness of the constituent companies, or to make the required improvements otherwise than by secured bonds, provided for and issued a series of first trust mortgage bonds payable to bearer, not to exceed in all sixteen million dollars ($16,000,000), dated July 1, 1889, the principal due in fifty (50) years with semi-annual interest at four (4)

per cent. per annum, the bonds or their proceeds to be used as follows: bonds to the amount of six million nine hundred thousand — ($6,900,000) or their proceeds, to exchange for or pay off the six million nine hundred thousand dollars
87 ($6,900,000) in bonds outstanding of the Denver & Rio Grande Western Railway Company and the interest and funded certificates therefor; an amount necessary, not exceeding seven million seven hundred thousand — ($7,700,000) of bonds, or their proceeds, to broad gauge the constructed lines of railroad, better and improve the same, purchase rolling stock, and make extensions to the constructed lines; and one million four hundred thousand dollars ($1,400,000) of said bonds to be kept as a capital reserve for new lines and other purposes; that to secure the payment of said bonds or so many *that to secure the payment of said bonds or so many* as should be negotiated, and the interest thereon, this defendant, on or about July 1st, 1889, made its trust deed bearing date on that day to the Central Trust Company of New York, as trustee, conveying all its lines of railroad constructed or owned, being about three hundred and seventy-three (373) miles of constructed railroad, and its franchises to construct other lines of railroad, and all railroads thereafter constructed with said bonds or their proceeds and included therein and conveyed all the lines of railroad and railroad tramway easterly and westerly from Sandy aforesaid, and theretofore purchased and owned by the Denver and Rio Grande Western Railway Company as aforesaid; that this defendant negotiated and sold bonds to purchasers in good faith and soon after the date thereof with said bonds or the proceeds thereof paid off, cancelled and retired the six million nine hundred thousand dollars ($6,900,000) in bonds theretofore issued by the Denver and Rio Grande Western Railway Company, and also paid off all the indebtedness of said last named company, the whole amounting to over eighteen thousand five hundred dollars ($18,500) per mile, in respect to said railroads and tramways easterly and westerly from Sandy, as well as in respect to other railroads of that company; that this defendant also expended of said bonds and the proceeds in broad gauging, improving and equipping the lines of railroad it acquired on its organization, at the rate of about twenty
88 thousand dollars ($20,000) per mile, of said bonds, and expended therefrom large sums in improving the said lines of railroad and tramway running easterly and westerly from Sandy; and that for the purposes specified in said bonds and trust deed, this defendant, prior to April 1, 1899, had negotiated and sold bonds of said series and secured by said trust deed, to the amount of fifteen million two hundred thousand dollars ($15,200,000), which are still outstanding, and that bonds of said series to the amount of eight hundred thousand dollars ($800,000) were cancelled, upon the issue of another series of bonds as hereinafter stated.

And this defendant claims and avers that upon its organization it became and has since continued to be a purchaser in good faith of the said lines of railroad and railroad tramways running westerly

from Sandy to and up Bingham cañon a distance of twenty (20) miles, and from Sandy easterly to and up Little Cottonwood cañon to Alta aforesaid, a distance of sixteen (16) miles, more or less, and without any notice or knowledge of the alleged or any frauds, irregularities or defects in the sales or as inducements to or in any way connected with or related to the sales under the deeds, or either of them, of the old Wasatch Company and Bingham Cañon & Camp Floyd Railway Company.

And this defendant shows that on the first day of April, 1899, it required further means to extend, improve and equip its lines of railroad, and to acquire connecting railroads and their stock and bonds, and to extend and further its business; that its limit of bonds of the series last aforesaid had been reached within eight hundred thousand dollars ($800,000) which was insufficient in amount for its purposes; and that thereupon it authorized and made a new series of bonds payable to bearer called first consolidated mortgage bonds, registered and coupon, the coupon bonds to be for one thousand dollars ($1,000) each and the registered bond for one thousand dollars ($1,000) or some multiple of one thousand dollars ($1,000), all bearing date April 1st, 1899, the principal payable at the end of fifty (50) years and interest at the rate of four per cent. per annum, payable semi-annually after date, and said series of bonds to be used and issued as follows: Sixteen mil-
89 lion dollars ($16,000,000) to be reserved to retire the bonds secured by said trust deed to the Central Trust Company as aforesaid, and the remainder to be issued at a rate of not exceeding twenty thousand dollars ($20,000) per mile for railroads not included in the trust deed to the Central Trust Company above mentioned, which this defendant had acquired or should thereafter acquire or of which it should acquire the capital stock and securities; also not to exceed in all ten million dollars ($10,000,000) for improvements and other uses of this defendant, and one million dollars ($1,000,000) for equipment and other purposes; and also five hundred thousand dollars ($500,000) per annum, but not to exceed nine million dollars ($9,000,000) in all for rolling stock, improvements and other beneficial purposes; that to secure the said bonds issued or to be issued this defendant by its first consolidated trust mortgage deed, dated April 1, 1899, conveyed to the State Trust Company (now by change of name called the Morton Trust Company), of New York city, all its railroad lines owned, acquired and to be acquired, and all its interest in the capital stock and bonds of associated and connecting railroads, with all appurtenances and property, real or personal, used or connected therewith; that said trust deed thereby became a second lien on all the property conveyed to the Central Trust Company as aforesaid, and a first lien on all the remaining franchises and property of the company acquired or to be acquired; that prior to June 30th, 1900, this defendant had issued to various persons and parties, purchasers in good faith, about two million five hundred thousand dollars ($2,500,000) in par value of said bonds and has since issued other bonds of said series to an amount of one

million five hundred thousand dollars ($1,500,000) additional, making in all four million dollars ($4,000,000) in par value of said bonds now issued and outstanding; and that the said railroads and railroad tramways running easterly and westerly from Sandy aforesaid are subject to both the mortgage deeds of this defendant above stated. And on information and belief this defendant avers that neither of the said trustees nor any purchase or holder of said
90 bonds had any notice or knowledge of any of the alleged, or of any defects or irregularities in the sales, or of any frauds affecting or inducing or of any matter or thing whatever unfavorably affecting the validity of the sales of the said railroads by the trustees of the old Wabash Company and the Bingham Cañon & Camp Floyd Railway Company.

And this defendant answering as to the alleged frauds, fraudulent inducements, defects and irregularities in the sales by Young and Scofield and Davis as trustees, of the railroads running easterly and westerly from Sandy, on its information and belief denies each of and all the charges set out in the bill of complaint, and denies that the complainant first discovered in July, 1898, or at any time discovered that this defendant or its predecessor in title acquired the possession of or any lien or interest in said property or any part thereof, through the fraudulent proceedings described in the bill of complaint or any fraudulent proceedings, or that the alleged fraud was or ever has been kept concealed from the Union Trust Company as trustee or from any holders of bonds under the alleged trust deed to said trust company, or that any fact connected with said sales or either of them, was concealed from, or unknown until July, 1898, to, the complainant, The Union Trust Company or any bondholder under said trust deed or either of them; or, if said sales or either of them or any fact connected with said sales or either of them were so unknown, the defendant avers upon information and belief that it was so unknown through the negligence of the complainant, The Union Trust Company, or the bondholders under said trust deed (to whichsoever of them it was unknown), and not by any concealment of this defendant or the Denver and Rio Grande Western Railway Company, its predecessor in title. This defendant denies that the books of account and financial statements of said railroads, or either of them, were at any time taken possession of by officers and agents or any officer or agent of this defendant or any predecessor of it in title, or have been kept concealed or are now concealed by any officer or agent of this defendant or in any
91 way concealed to its knowledge. This defendant alleges that as to the contents of said books of account or financial statements or what they show, this defendant is ignorant, and has no knowledge, information or belief concerning the same.

And this defendant further answering as to the charges of fraud in the bill of complaint in respect to the said sales by Young and Davis and Scofield as trustees, on its information and belief denies that there was no default in the payment of the interest coupons upon which defaults the principal of the bonds was declared to be

due; or that the net earnings of the said respective railroads were more than sufficient to have paid the said coupons either at the time when the respective defaults were declared, or on the days of sale; or that the Denver and Rio Grande Western Railway Company or its attorneys, officers, or agents or any of them at or before the times of sales or at any time knew or had any reason to know, that there were sufficient net earnings to pay said coupons; or that said last named railway company, for the purpose of depriving any holder of any bonds under the trust deed to the Union Trust Company of their security, or to enable it to acquire possession of the property and railroads, or for any purpose or in any way, by its officers, agents or attorneys or in anywise or by any means or agency, entered into the alleged or any fraudulent scheme with the trustee Charles W. Scofield, or any scheme in or by which it was understood or agreed, or in anywise contemplated, that the said defaults or any defaults should be declared to exist, when no default existed, for six months or any other period on certain or any interest coupons secured by said trust deeds, or that the principal of said bonds should be declared to be due by reason of alleged defaults, or that it was understood that the substitution of said Young, as trustee, by said Scofield should be pretended to be made, or that said Young was or was to be a clerk of said Scofield, or that no substitution of said Young as trustee was legally made; or that it was understood or agreed that said Young by reason of the alleged pretended defaults, or for any reason should declare the principal of the bonds, or any bonds described in the trust deed to Kountze and
92 Hall to be due; or that it was further understood or agreed that said Young as pretending trustee should advertise and sell the railroad of the old Wasatch Company under the power in its trust deed, or that the said Davis, trustee, with said Scofield, left the performance of the trustee's duties to Scofield, or that it was understood or agreed that said Scofield, in behalf of himself and said Davis (the trustees of the trust deed of the Bingham Cañon & Camp Floyd Railway Company) or otherwise, was to declare the principal of the bonds secured by said trust deed to be due, because of alleged defaults in the payment of certain interest coupons; or that thereupon said Scofield and Davis were to advertise and sell the railroad properties covered by said trust deed by virtue of the power therein; or that the said foreclosure sales made by said Young, and Davis and Scofield, or either of said sales, took place in accordance with the alleged or any fraudulent or any other scheme; or that the said Scofield in consideration of engineering said alleged or any fraudulent scheme or otherwise was to be allowed one-third of the profits or any profits of the purchase by the Denver and Rio Grande Western Railway Company; or that neither said Scofield nor Davis was present or acted at the sale made by them; or that the attorneys and agents, or any attorney or agent of the Denver and Rio Grande Western Railway Company conducted the proceedings of the sale or acted as auctioneers, or bid off the property; or that the said Charles F. Woerishoffer was then or ever had been a

director of the Denver and Rio Grande Western Railway Company, or then or at any time acted for or in its behalf, or directed the trustees' deed to be made to it otherwise than at the request and for the Rio Grande Western Construction Company as hereinbefore stated; or that the deed to said railway company was prepared by its attorneys, or made by the trustees without the payment of the bid; or that said trustees had no power to delegate their authority to offer the property for sale; or that no express authority was given by said trustees to any person to make said sale; or that said sale, bidding and conveyance were made or that either was made
93 in accordance with the fraudulent scheme set out in the bill of complaint, or in pursuance of any fraudulent scheme, or any scheme other than the honest and proper performance of duty by the trustees pursuant to the terms of their trust, and a proper and honest bidding and purchase at such sale and a proper and honest conveyance in pursuance thereof; or that such sale, bidding or conveyance was made for the purpose alleged in the bill of complaint, or for any fraudulent purpose or otherwise than as admitted by this defendant.

And this defendant, on information and belief denies that at the time of the sale of the Bingham Cañon & Camp Floyd Railway Company's railroad, under its trust deed it was worth one million dollars ($1,000,000), or that it was worth more than the sum bid, or that three hundred thousand dollars ($300,000) was an inadequate price, or that it was paying a net sum of over six (6) per cent. or any net per cent. per annum of interest on that amount; or that the old Wasatch Company's railroad at the time of the sale by Young was worth eight hundred thousand dollars ($800,000), or paying a net sum equal to six (6) per cent. or any net per cent. per annum on that sum, or that said railroad was worth over fifty thousand dollars ($50,000), or that the sum bid was an inadequate price, or that it was not paid; or that said Young or any attorney, officer or agent of the Denver and Rio Grande Western Railway Company learned that certain or any bondholders of the old Wasatch Company, or any person or party would bid at the sale on the day advertised or on any day, at least the sum of three hundred and fifty-five thousand dollars ($355,000), or about the amount of its bonded indebtedness, or any amount more than fifty thousand dollars ($50,000), or that thereupon the said Young at the request of the officers of the Denver and Rio Grande Western Railway Company, or to prevent competition of bidders, or higher bid than fifty thousand dollars ($50,000), adjourned the sale; or that upon said adjournment or at any time the officers or attorneys, or any officer or officers or attorney or attorneys of said railway company agreed with certain or any bondholders or bondholder as alleged in the bill of complaint, or made
94 any agreement, upon the consideration alleged in the said bill of complaint or otherwise, to prevent competition of bidders at said sale; or that the alleged bondholders or any bondholder accepted the alleged or any offer of the Denver and Rio Grande Western Railway Company, or agreed not to bid at the sale, or for

any of the reasons alleged, consented to the sale as made by said Young; or that any bondholder did not receive his *pro rata* of the bid until several years after the sale, or until threats of a suit for an accounting against Young. And this defendant on information and belief denies that the Denver and Rio Grande Western Railway Company knew when it received its deeds of conveyance for said properties that they had been or were being purchased at inadequate prices, or that the price for either railroad was inadequate; or that it knew that the Bingham Cañon and Camp Floyd railroad was worth one million dollars ($1,000,000), or earning six (6) per cent. net annual interest on that sum, or that it knew it was worth more than the bid; or that said railway company knew the old Wasatch Company's railroad was worth eight hundred thousand dollars ($800,000) or any sum more than the bid, or was earning six (6) per cent. per annum on eight hundred thousand dollars ($800,000), or anything net over operating expenses.

This defendant on its information and belief admits that at the time of the sale of the old Wasatch Company's railroad by Young, as trustee, about one-third of the bonds outstanding (the whole amount being three hundred and forty-five thousand dollars ($345,000) and not three hundred and fifty-five thousand dollars (355,000), were held by persons other than the bidder, but denies that they were men of large means or intended bidders; and this defendant on information and belief avers that all holders presented their bonds and received their *pro rata* of the proceeds of sale from the trustee, with knowledge or means of knowledge of all the proceedings prior to the sale. This defendant has no knowledge as to whether the said Young adjourned the sale as alleged, without advertising the adjournment, but alleges on information and
95 belief that if in fact said sale was so adjourned, ample authority was given therefor in the deed of trust under which he sold.

And this defendant answering on information and belief shows that after the making of the trust deed of the old Wasatch Company and prior to the sale, William A. Hall, one of the trustees of the deed, died, leaving Augustus Kountze, the other trustee, surviving, who in accordance with the powers of the deed duly appointed George M. Young a co-trustee; that afterwards and before the sale or proceedings for the sale, the said Agustus Kountze resigned his trust and trust powers, and the resignation was duly accepted by the old Wasatch Company, all in accordance with the provisions of said trust deed; that no trustee was appointed in his place and a vacancy of co-trustee with said Young existed and thereafter continued; that thereupon and by the provisions of said trust deed the said George M. Young became the sole trustee and vested with all the estate, powers and authority of the original trustees of the deed, and made the sale in pursuance of the powers of said deed; that said deed conveyed the mortgaged property and gave power of sale to the original trustees jointly and to the survivor, and their successors, and provided that the word "trustees" wherever therein used

should mean the trustees or trustee for the time being, whether original or new, and whenever a vacancy should exist to mean the surviving or continuing trustee, and that such trustee should during such vacancy be competent to exercise all the powers granted or conferred upon the trustees named in the deed of trust; that the said sales made by the said Young and Scofield and Davis as the respective trustees as this defendant is informed and believes, were fairly made and honestly conducted; that defaults in payment of interest and for the non-payment of which the sales were made, existed and had continued and were declared, and the principal declared due, in accordance with the provisions of the trust deeds under which the sales were made, and the sales made in accordance with the powers of the deeds and for the causes upon which sales were thereby authorized.

And this defendant further answering in respect to the
96 values of said properties at the time of said trustees' sales, alleges upon information and belief that the old Wasatch Company's line from Sandy to Alta was narrow gauge, and for about eight miles from Sandy to Wasatch was adapted to steam power; that it was cheaply constructed, mainly on Government land, and the track consisted of iron rails of not over thirty (30) pounds weight per yard, and its rolling stock of little value; that the tramway from Wasatch to Alta, of about eight (8) miles, was on Government land, poorly constructed, not adapted to steam power, but intended to be operated hauling up cars with horses or mules and letting them down by gravity, the track made of iron rails of the weight of about sixteen (16) pounds per yard, and its only equipment was cars of little value; that the value of the road consisted wholly in the successful operation of mines in Little Cottonwood cañon and vicinity and in getting ores for transportation to the Jordan valley, on which it was obliged to make rates sufficiently low to avoid competition by wagon hauling; that when said railroad was contemplated, and until a year or two after its construction to Alta, there was a large quantity of mineral ore produced near Alta, but prior to the sale the mines in and near Alta had practically failed to yield ores, and the larger part of the business of the road ceased; that at the time of and before the sale the road had become practically worthless, unless for the speculative chance that the business of mining in and around Alta should revive; that since the sale the shipment of ores from Alta has been very small and the tramway has been abandoned and is used as a wagon road, and that the operation of the road from Sandy to Wasatch has practically ceased for want of business to support it, or pay operating expenses; that at the time of the sale of the whole road was not worth fifty thousand dollars ($50,000) and has never since paid operating expenses and maintenance; that the railroad westerly from Sandy for about sixteen and thirteen one hundredths (16 13/100) miles was adapted to steam power, was narrow gauge, the right of way partly on Government and partly on
97 settled lands, the right of way over the latter inadequate and partly unpaid for, the roadbed narrow and cheaply con-

structed and the track of iron of not over thirty (30) pounds weight per yard, and the rolling stock insufficient and of poor quality, and as it existed at the time of sale said sixteen and thirteen one hundredths (16 13/100) were not worth, and could have been replaced for, $175,000; that the tramway in extension of the steam power road was on Government land, laid with iron rails of the weight of about sixteen (16) pounds per yard, and intended for use and used for hauling cars up with horses or mules and letting them down by gravity, and the cars of little value, the whole value of the tramway being less than ten thousand dollars ($10,000); that at the time of sale the road was not of any considerable value unless mines in the West Mountain mining district should be developed and yield ores for transportation by the road; that the sum of three hundred thousand dollars ($300,000) bid for the road was in excess of its real value and of the amount for which it could be replaced, and the bid for so large a sum was only justified by the expectation of continued and increased production of ores for shipment to the Jordan valley by said road; that as to the steam power part, since the said sale the track has been twice replaced by the use of heavier rails, once with steel rails of forty-five (45) pounds per yard and once with steel rails of sixty-five (65) pounds per yard, the gauge widened, the road bed improved, rolling stock supplied, rights of way acquired and paid for, and large sums expended thereon by said defendant and the Denver and Rio Grande Western Railway Company, its predecessor in title, and by reason thereof and of the increase of mining business in said district, and of its operation in connection with other railroads owned by this defendant and its said predecessor in title, the steam road has been made fairly profitable for several years; and that the tramway, with branches made at the expense of this defendant and mine owners, during most of the time since
98 said sale has been let to lessees without any rental other than the agreement that the lessees should haul all ores offered for transportation, to the steam road at not exceeding a freight rate named, and which was necessary to meet competition by wagon haul to the Jordan valley, and branches of said tramway have been extended to mines in said district.

And this defendant admits that, upon its organization part of the officers and persons who controlled the Denver & Rio Grande Western Railway Company became interested in and some of them became officers of this company, but denies they were all the same persons, and upon information and belief denies that the persons who became officers of this company knew or that any of them knew of the alleged or any fraudulent scheme connected with the sales of said railroads by said trustees, or either sale, or knew that there was sufficient or any money from net earnings of the alleged consolidated Wasatch & Jordan Valley Railway Company and its constituent companies or any or either of them, to pay the interest on the mortgages foreclosed; or knew that the defaults were or that either was alleged for the purpose of declaring principal due or in order to enable the trustees or either trustee to sell the mortgaged

premises in the manner alleged in the bill of complaint or in any way.

And this defendant alleges upon information and belief that at the time the Denver & Rio Grande Western Railway Company acquired possession of said railroads that company and all of its directors and officers believed and had reason to believe that the sales thereof and the conveyances thereof to that company were regular, honest and strictly proper in every respect. And this defendant alleges that when it acquired possession it and all of its directors and officers did so believe and have reason to believe.

And this defendant denies that the amount of the tolls, rents and income and the rental value of said railroads taken possession of or used by the Denver & Rio Grande Western Railway Company and this defendant exceeds the amount of principal and interest of the bonds secured by the mortgages thereon; but on the contrary
99 this defendant alleges upon its information and belief that there has been no net income of any kind from the railroad from Sandy to Alta, and that by reason of the improvements made on, and the connected operation of said railroad from Sandy for sixteen (16) miles westerly, and especially by the increase of mining in the West Mountain mining district, some net income has been derived therefrom, to an amount this defendant cannot precisely state, but which has not been as much as the interest accrued upon the said three hundred thousand dollars ($300,000) of the said bonds secured by first mortgage thereon as aforesaid.

And this defendant alleges, that for more than eighteen (18) years last past, it and the Denver and Rio Grande Western Railway Company, its predecessor in title and possession, and under claim and color of title, exclusive of any other right, have been in the exclusive, open, continuous, peaceable and adverse possession as owners of all the lines of railroad and tramways described in the complaint, one line running from Sandy westerly to and into Bingham cañon, a distance of twenty (20) miles, and one running from Sandy aforesaid easterly to and up Little Cottonwood cañon to Alta, a distance of sixteen (16) miles more or less, with all the side tracks, spurs, and property, real and personal, appurtenant thereto and have paid all taxes and assessments thereon; and that neither the alleged consolidated Wasatch & Jordan Valley Railway Company, nor any person or party claiming through or under it, nor any person or party through or under which it claims, has been seized or possessed of said railroads or any part thereof within seven (7) years, or within eighteen (18) years before the commencement of this action.

And on information and belief this defendant avers, that all the acts preceding, attending, and following the sales of the said railroads and tramways were open and largely matters of record, and if in fact there were any of the alleged frauds, irregularities or defects therein the same were known to or by reasonable diligence and inquiry ascertainable at the time or soon after the sales, by the alleged consolidated Wasatch & Jordan Valley Railway Com-
100 pany, the Union Trust Company, and the holders (if any), of

the bonds alleged to have been secured by the trust deed to the Union Trust Company as trustees; that the sales were openly made, the deeds reciting the sales and consideration were soon thereafter recorded, the grantee went into and held open possession, the alleged consolidated Wasatch & Jordan Valley Railway Company ceased to exercise any corporate franchises or to carry on any business, or hold meetings and wholly ceased to act as a corporation, or to pay any interest on its alleged bonds; and that if any act or fact connected with said sales has remained unknown until 1898, or until any time within the last eighteen (18) years and more, it has been through the laches and gross neglect of said alleged consolidated company, the Union Trust Company as trustee and the holders of bonds under the alleged deed to the last named company.

And this defendant alleges and insists that the cause of action, and each and every cause of action, alleged or pretended in the bill of complaint was at the time of the filing of the said bill and at the time of the commencement of this suit, completely barred by the statutes of the State of Utah with respect to the limitation of time for the bringing of actions.

And this defendant further answering on its information and belief denies that the Wasatch & Jordan Valley Railway Company alleged to have been incorporated by consolidation and which for distinction is herein referred to as the "new Wasatch Company," is or ever has been a corporation organized under the laws of the Territory of Utah, or is now a citizen of the State of Utah. This defendant, however, admits, that on the 8th of May, 1879, there was filed in the office of the auditor of public accounts of the Territory of Utah, an instrument bearing date April 29th, 1879, purporting to be articles of incorporation by the name Wasatch & Jordan Valley Railroad Company of a corporation formed by the consolidation of the said Bingham Cañon & Camp Floyd Railway Company and the Wasatch & Jordan Valley Railroad Company herein referred to as the "old Wasatch Company," and that said instrument recites that said constituent companies had consolidated with the written
101 consent of all the stockholders of the constituent companies, and purports to be articles of said consolidated company, and is signed in the name of each constituent company by C. W. Scofield as the president of each, with a seal purporting to be a seal of each affixed, and purporting to be attested by the secretary of each company respectively; but this defendant, on information and belief denies that all the stockholders of each constituent company had consented in writing to the alleged consolidation or that any meeting of the stockholders of either constituent company had been held to consider or act on the alleged consolidation; or that the boards of directors of said constituent companies, or the said companies ever agreed upon the terms of consolidation, or that due or any notice was given by advertisement of the consolidation or of the proposed consolidation.

And on information and belief this defendant states, that some years prior to the supposed consolidation of said constituent com-

panies, the said Charles W. Scofield had acquired the controlling interest in the capital stock of each, and the control of the sale and disposition of their bonds, and for some years had managed and controlled the companies and disposed of their securities at will, and though each company kept a board of directors and other officers; that such boards and officers were merely agents of and acted in all the business of the companies under the plans and directions of said Scofield, who, then and at the time of the alleged consolidation, was the president of both constituent companies, and had himself appointed president of the supposed consolidated "new Wasatch Company" immediately upon the making of its articles; and that the supposed articles of incorporation of the new Wasatch Company were made and filed on and according to his own plan and direction by himself as president of both companies, and not in pursuance of any agreement of the directors of the constituent companies or by consent of all their stockholders, and that, thereafter, no change in the former business of the constituent companies was made, or any new franchises exercised.

102 And this defendant admits the formal execution and recording of a trust deed purporting to be made by the "new Wasatch Company" as shown by Exhibit "A" annexed to the bill of complaint, but on information and belief this defendant denies that immediately after the recording of said trust deed there were issued or sold or have been outstanding, except as herein stated, eight hundred and eighty-four (884) bonds or any of said bonds, or that complainant owns five hundred and seventy-nine (579) bonds or any bonds issued or sold by said company. That as to whether payment of interest coupons on five hundred and seventy-nine (579) bonds or any bonds has been demanded, this defendant is ignorant and has no knowledge, information or belief concerning the same; but defendant admits and alleges that no interest has ever been paid by said company on any of the said bonds.

This defendant has no knowledge, information or belief as to whether the alleged demand or any demand on the trustee to declare the principal of said bonds immediately due and payable and to bring suit was ever made or that whether the trustee declined to act, or whether the complainant has elected to declare or has declared the principal of five hundred and seventy-nine (579) bonds due and payable.

This defendant on its information and belief denies that there is due on said five hundred and seventy-nine (579) bonds, the principal sum of five hundred and seventy-nine thousand dollars ($579,000) or any amount, or for interest $825,976.83 or any amount, or a total of $1,404,976.83 or any amount, payable by sale of said railroad properties, or in any way payable; and denies that the possession or interest of this defendant, of and in said properties is or ever was subject to any lien under the alleged trust deed of May 1, 1879. On information and belief this defendant admits that the Union Trust Company of New York accepted the supposed trusteeship under the said alleged trust deed and certified

as trustee eight hundred and eighty-four (884) of the bonds purporting to be secured by said deed. But this defendant states and shows upon its information and belief that said deed
103 if authorized at all, was authorized by the persons who were directors of said new Wasatch Company, and not by such directors and that the said trust deed was made and signed before the alleged articles of incorporation were filed, though the deed was not acknowledged until after such filing; that the provisions of said deed are such that it afforded no security or protection to purchasers and was adopted for use for fraudulent and speculative purposes; that its description of the mortgaged line is vague and gives no mileage of the whole or what part had been constructed; that, although it is called a first mortgage, it did not and does not disclose that all the constructed railroad was already mortgaged for much more than its value; that, although it provides for mileage limit of twenty thousand dollars ($20,000) per mile of constructed road, it does not show prior construction or mortgages, or provide any way to ascertain or enforce the limit, or that the trust company should do otherwise than certify the bonds belonging to the series to be sold, hypothecated or otherwise disposed of by the officers and agents of the company upon the most favorable terms attainable; that the said Charles W. Scofield hastened to get the bonds prepared and signed; and that the said Union Trust Company inadvertently certified eight hundred and eighty-four (884) bonds and delivered them to the said Scofield before its attention was called to the character of the security; and that, as soon as its attention was so called, as it was, it then refused to certify more; that neither the supposed company nor any of its officers or agents in its behalf ever negotiated, sold, hypothecated or otherwise disposed of any of said bonds; that no proceeds thereof have ever been received by it or applied to its use to pay its debts, or otherwise used for its benefit; that said eight hundred and eighty-four (884) bonds remained in the possession of said Scofield until after the sales and transfers of all the property of said company, under the prior mortgages, and possession thereof taken by or under the purchasers, and until after the alleged new Wasatch Company had ceased to do any business
104 or exercise any corporate franchises; that if said eight hundred and eighty-four (884) bonds or any of them have been transferred or in anywise disposed of or put upon the market, they have been pledged, sold or transferred by the said Charles W. Scofield to and for his own use, and in fraud of said company, and since said company ceased to do any business or own or use any property; and that if the complainant holds five hundred and fifty-nine (559) of said bonds or if any other party holds any of the eight hundred and eighty-four (884) bonds, he is not a purchaser in good faith or for value, but purchased or took the same at a trivial price, if any price at all, and with knowledge that the same had not been put out by the obligor company, that it had no property and was not exercising any franchises, that no interest had ever been paid, and that the negotiation of said bonds was fraudulent.

And this defendant shows and claims that all the interest coupons of said bonds maturing more than six years prior to the commencement of this action are barred by the statutes of limitations of Utah and New York.

And this defendant shows upon its information and belief that upon its organization about May 16, 1889, the Denver and Rio Grande Western Railway Company and its franchise to be a corporation, ceased, and this defendant succeeded to all its franchises, powers, and all its property and property rights; and that the defendant the alleged new Wasatch & Jordan Valley Railroad Company for over nine years last past has wholly ceased to use its franchise, if it had one, or any franchise, to be a corporation, or any franchise or authority to act as a railroad company under the laws of Utah and that by said laws, any franchise it may have had was forfeited long before the commencement of this action.

And this defendant denies all unlawful combination, confederacy and fraud charged in the bill of complaint; without this that any other matter or thing in the bill of complaint, material or necessary for this defendant to answer, and not herein answered, confessed, traversed or denied, is true to the knowledge or belief of this defendant; all of which this defendant is ready to maintain and prove as the court shall direct; and this defendant prays to be hence dismissed with its reasonable costs and charges.

105

THE RIO GRANDE WESTERN RAILWAY COMPANY,

[SEAL.] By WALTER HINCHMAN, *Third Vice-President.*

Attest: GEO. A. KRAUSE, *Secretary.*

BENNETT, HOWAT, SUTHERLAND & VAN COTT, *Solicitors.*
ROBT HARKNESS, *Of Counsel.*

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss.:*

The answer of the defendant, The Rio Grande Western Railway Company, was taken this 19th day of April, 1901, before me under the common seal of the said corporation, as by its said seal affixed appears.

(S'd) WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss.:*

Walter Hinchman, being duly sworn, deposes and says: I am the third vice-president of The Rio Grande Western Railway Company, one of the defendants in this suit. The foregoing answer is true of my own knowledge except as to the matters therein stated to be

alleged upon information and belief, and as to those matters I believe it to be true. As to all matters not therein stated upon my knowledge, the sources of my information and the grounds of my belief are records and documents in the pos-ession of the said
106 defendant, of which I am the third vice-president, and general information received by me in the course of my duties as such officer.

(S'd) WALTER HINCHMAN.

Sworn to before me this 19th day of April, 1901.

WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

107 EXHIBIT A.

Agreement between the Denver and Rio Grande Western Railway Company and the Rio Grande Western Construction Company.

This agreement, made and entered into this first day of August, in the year one thousand eight hundred and eighty one between the Denver and Rio Grande Western Railway Company, a corporation created and existing under and by virtue of the laws of the Territory of Utah, and hereinafter named as the railway company, or the said railway company, as party of the first part, and the Rio Grande Western Construction Company, which is a corporation created under and by virtue of the laws of the State of Colorado, duly and legally authorized to transact business in the Territory of Utah aforesaid, and hereafter called the construction company, or said construction company, as party of the second part, witnesseth, as follows:

That whereas, the said party of the first part was created and is existing as a corporation as aforesaid by the consolidation of the other railway corporations of the said Territory of Utah, to wit: the Denver and Rio Grande Western Railway Company, the Sevier Valley Railway Company, and the Salt Lake and Park City Railway Company, which consolidation took place and was perfected on the twenty first day of July, 1881, by reason whereof the said party of the first part succeeded to all the property, estate, franchises and rights of the said consolidated corporations, and assumes all the contracts and liabilities thereof;

And whereas, prior to the date of such consolidation, the said construction company had performed work and labor and furnished material for the purpose of constructing the railways of the said consolidating companies, or of some of them;

And whereas, the party of the first part contemplates the construction of the system of railways over the routes defined in its articles of association and incorporation, and the party of the first part by said consolidation having acquired the title to all the
108 property, rights of way, work, labor and materials of the said consolidating corporations, and became chargeable with the

liabilities of said consolidating corporations towards said construction company incurred in said work of construction;

And whereas, it contemplates the continuation of the said work of construction, and the construction and completion of the system of railways described in its articles of association, and the said construction company is willing to undertake the construction and completion thereof as contemplated by this contract;

Now therefore, it is mutually covenanted and agreed between the said parties, for themselves, their successors and assigns, respectively, as follows, to wit:

ARTICLE I.

The said railway company hereby agrees with the said construction company that it has received from the said consolidating corporations hereinbefore named, all the right, title and interest of each of the said consolidating corporations in and to all their contracts with the said construction company, and in and to all the real estate, right of way, work, labor, implements, tools, utensils, materials, books, maps, papers and surveys of the said consolidating corporations, and that it does hereby assume and agree to pay to the said construction company, in manner and form as hereinafter specified, the compensation hereafter provided for all work, labor and services of the said construction company, and materials furnished by it, and for right of way heretofore by it acquired on behalf of the said consolidating companies, or of the party of the first part, the prices hereinafter stated, which prices it is hereby mutually agreed shall be in full settlement for all such prior work, labor and services, property, materials, books, papers, maps and right of way, and that all prior contracts between the said construction company and the said consolidating corporations shall be and hereby are merged in this contract, and are covered by and included within the terms and conditions thereof.

109 ARTICLE II.

And the said construction company covenants and agrees with the said railway company, that it has heretofore proceeded with the construction of certain lines of railway in the Territory of Utah, for and on behalf of the said consolidating corporations, or of one or more of them, and that it has contracted for and procured large quantities of materials, work, labor, property, right of way and real estate, for and on behalf of said companies, and it hereby recognizes and agrees that all the rights and title, and interest of the said consolidated corporations, in and to the same and each and every part thereof, is vested in the said party of the first part, and that the said construction company shall and will diligently proceed with the construction and equipment of the said railways aforesaid, of the said party of the first part, and the telegraph lines appurtenant thereto, and required and necessary for the use, operation, conduct and maintenance of the said lines of railway, and it shall and will

complete the same in accordance with the terms and conditions of this agreement as soon as practicable, together with such extensions and branches, and connecting lines, as may from time to time hereafter be mutually agreed upon between said railway company and said construction company, all and singular said railway and telegraph lines, extensions, branches, and connecting lines to be constructed in divisions or sections, and in such order as to priority as shall be directed by said railway company from time to time, and as the population and business of the country and financial considerations shall warrant.

ARTICLE III.

And the said construction company covenants and agrees to build the said railway and telegraph lines upon such route and routes as shall be selected and indicated by the said railway company; to make the road bed of proper width for a gauge of three feet, put down the track with proper cross-ties and rails for said gauge, with all necessary and proper sidings and turnouts, to complete and equip the same under the direction of the said railway company and its officers, and in so doing to conform in all essential respects, to the profiles, maps, drawings, specifications and requirements of the said railway company, both as to quality of material and mode of construction, it being mutually understood and agreed that the general style and finish of the work, and quality of materials, and mode of construction, and extent and fitness of equipment, shall not be inferior to those of the Denver and Pueblo division of the Denver and Rio Grande railway, in the State of Colorado, when it was turned over to the company by the contractors; and it being also further mutually understood and agreed that the entire work shall be done by the said construction company, as above indicated, in a good and sufficient workmanlike manner, to the satisfaction and acceptance *to* the board of directors of the said party of the first part, and that the said work shall include the grading, construction of road beds, the furnishing and laying of all rails with the joints, spikes, sleepers and timbers necessary therefor; the building of all bridges, viaducts, and tunnels—if any—along the route selected, and to a connection with railroads in any adjoining State or Territory, as the same shall be determined by the said railway company; the building and furnishing of all depots and engine houses, station houses, ware and storehouses, water tanks, shops and all other buildings necessary or requisite for properly conducting the business of each division when it shall be turned over to the railway company, and the furnishing of all engines, passenger and freight cars, machinery, tools, shafting, telegraph poles and wire, pumps, machinery and engines adequate for working the same, and for the conduct of the business of the said railway and telegraph line, or any section or division thereof, when and as the same shall be turned over to the said railway company.

111 It being likewise mutually understood and agreed that the locomotive engines, passenger and freight cars and other rolling stock, may be delivered subject to the compliance on the part of the said railway company with any contract or contracts for the furnishing, purchase, or procurement thereof, which may be made by the construction company with the approval and consent of the said railway company, and as shall be hereafter mutually agreed upon between the parties hereto; and that the agreement in this article contained respecting telegraph lines, poles, wire and equipment, shall only extend to so much thereof as shall not be furnished or constructed by a telegraph company, without further cost to the railway company, by agreement between them for joint construction and use thereof.

ARTICLE IV.

And the said construction company further covenants and agrees to obtain all rights of way, depot grounds, and real estate necessary for the construction, use, operation and maintenance of said railway and telegraph lines, at the time possession thereof shall be transferred and delivered to the said railway company as aforesaid, and to pay all costs, liabilities, disbursements and expenses which have been heretofore, and shall be hereafter, up to the time of taking actual possession and control of the work of construction, expended on account of the construction of any portion or portions of the lines of the said consolidating railway companies, or of the line or lines of the said party of the first part, or in the acquisition of right of way, depot grounds, or other real estate, or the protection thereof from all encroachments thereon by other parties, persons or corporations, pending said work of construction, and all legal expenses connected therewith, all engineering expenses, both in the field and in the office, incurred in respect of such construction or connected therewith; also all interest which has or shall become due, on any bonds or other obligations of the said railway company on
112 account of any part or portion or section or division of said railway or telegraph lines, before possession and control thereof shall be transferred and delivered to the said railway company.

ARTICLE V.

And the said railway company, in consideration of the covenants and agreements of the said construction company, does hereby covenant, stipulate and agree to pay to the said construction company for all the work, equipment, material, construction, right of way, real estate, property and otherwise, hereinbefore named, as follows, to wit:

First. In its first mortgage, six per cent. thirty year gold bonds, sixteen thousand ($16,000) dollars per mile for each and every mile of said railway and telegraph lines agreed to be constructed and transferred, as aforesaid.

Second. In its full paid capital stock, at the rate of sixteen thousand ($16,000) — per mile for each and every mile of the railway and telegraph lines agreed to be constructed and transferred, as aforesaid; and it is hereby further mutually agreed that the said railway company shall have the option and right at its election, to substitute in place of an equal amount of the said capital stock at its par value, the amount of cash which it has received or may receive, and not otherwise expended, from said consolidating companies on subscriptions to their capital stock, dollar for dollar.

Third. All such municipal, county, State or United States bonds, or other securities, as the said railway company shall receive, in aid of the construction of said railway, subject to compliance with all the conditions upon which said bonds are issued to said railway company.

Fourth. Such lands or real estate, if any, as shall be ac-
113 quired by said railway, in aid of the construction of its said line or lines of railway by grant, subsidy, purchase or otherwise, and not required by the said railway company for purposes connected with operating or maintaining its road, subject, however, to compliance by said construction company with all the conditions upon which said lands may be so acquired.

Fifth. All other subscriptions or subsidies, if any, which shall be received by the said railway company, to aid in the construction of its lines of railway and appurtenant telegraph as aforesaid, subject to compliance by said construction company with all the conditions upon which such subscriptions or subsidies shall be made.

Article VI.

The said railway company further covenants and agrees to deliver the said bonds and stock to the said construction company for the purposes of negotiations or sale, when, and as the negotiations of the said construction company for money to rapidly prosecute the construction of the said railway and telegraph lines, shall make it desirable or necessary, when, and as its officers may, in their discretion, altho' in advance of construction, call for the same, provided said railway company shall not be required to deliver its bonds more rapidly than permitted by the terms of the trust deed in securing the same.

Article VII.

It is further mutually stipulated and agreed that the construction of said railway and telegraph lines be proceeded with in divisions or sections of such extent, to be respectively commenced and completed at such times as may be hereafter mutually agreed upon between said parties, and that the work of construction may be commenced at as many different points along said line as may be hereafter mutually agreed upon, and be proceeded with simulta-
neously from said points in any direction along the routes
114 selected and determined upon, in order to secure vigorous

prosecution and early completion of the entire work, and that when either of said parties shall desire it, supplementary contracts shall be made and executed from time to time by and between them as to any particular division or divisions of the said railroad before or at the time of commencing work thereon, which shall name definitely, and explicitly specify the terms and methods of construction and equipment, and as to the times and lengths of sections in which the same shall be completed and delivered over to the said railway company, but such supplementary contracts shall, in no regard, conflict with the general provisions of the contract.

That in making such supplementary contracts the said parties shall take into consideration and be governed by the requirements of the country for railroad facilities for doing its business, the remunerative character thereof, and that the proportion of the above named bonds and stock, effects and property to be appropriated to the construction and equipment of each division, shall be as nearly equal in proportion to the cost of the whole work under this agreement, as can be ascertained by estimates made after the surveys, maps, profiles, specifications, etc., shall be completed, taking into consideration the comparative costs and difficulties of construction of all the divisions of the said railway to be made as aforesaid, and also taking into consideration the financial conditions and circumstances at the time being, all of which shall be determined and agreed upon between the said parties hereto, after detailed surveys of such division or divisions, or section or sections, have been made, and the maps, profiles, and specifications have been prepared; and such supplementary contracts shall in no wise conflict or be inconsistent with the provisions of any trust deed, given or to be given to secure payment of the bonds aforesaid, with the interest thereon.

And it is hereby further mutually agreed that the said construction company may cause any counstructed line of railway or any partially constructed line of railway, existing upon or along any or either of the routes aforesaid, to be transferred and conveyed to said railway company, and shall become entitled to compensation therefor, the same as if it had constructed the same, provided it shall put the same in condition, as contemplated by this contract, and cause the same to be conveyed free and clear of all incumbrances.

ARTICLE VIII.

And it is hereby mutually covenanted and agreed between said parties, that whenever any section of not less than twenty miles of any division of the said railway shall be completed and equipped by the said construction company under this contract, that the said railway company shall have the right to require that such completed section or sections shall be turned over to the said railway company upon its written demand, and thereupon, upon such demand, the said construction company shall transfer and deliver title and absolute possession and control thereof to the said railway company,

until the whole line of railway and telegraph shall be finished and so delivered and upon delivery to said railway company of each section or division of the said completed road and telegraph said railway company shall execute and deliver to the said construction company an instrument in writing evidencing its acceptance of such section or division, as constructed and equipped according to the contract; or if any work thereon or equipment thereof shall remain uncompleted under this contract, then such writing shall particularly specify what remains so uncompleted, in order to a full and perfect compliance with the terms of this contract; and as to such incomplete specifications the said construction company shall complete and construct the same diligently according to the provisions hereof; and until the said railway company shall receive and accept such sections or divisions as hereinbefore provided, the said construction company may, if it so elects, retain possession of and operate the same until the said railway company shall require the delivery thereof to it in manner and form aforesaid.

116 Agreement annexed to answer of R. G. W. Ry. Co.

And it is further mutually covenanted and agreed, that after such section or division of the said line of railway, shall be delivered to and accepted by the said railway company, and be by it used and operated, that it shall transport over the same promptly, and to the exclusion of all other business, if necessary to secure promptness, all material, laborers, employees, and other things required by the said construction company in the construction and equipment of said railway and telegraph, or in the construction and equipment of other lines of railway and telegraph by its being constructed for and on account of the said railway company and that for all such transportation the said construction company shall pay to the said railway company the actual cost thereof, as nearly as can be ascertained; or in case any section or division of said lines of railroad and telegraph shall remain in the possession of and be operated by the said construction company as above provided after it shall be completed, then, and during the period of such possession and operation, the said construction company shall have the right to transport over the same promptly, and to the exclusion of all other business, if necessary to secure promptness, all laborers and employees, material and other things required by said construction company in the construction and equipment of the said railway and telegraph lines, or in the construction and equipment of other lines of railway and telegraph by it being constructed for or on account of the said railway company; and that for all such transportation the construction company shall credit on and allow in the accounts to be kept by it, as hereinafter provided, the actual cost thereof as nearly as can be ascertained; and the said construction company shall keep an accurate and detailed account of all receipts and expenditures connected with the operation by it of such section or division, giving credit or making allowance on such account as aforesaid, and shall render to the said railway company a statement thereof monthly; and in case there shall be a surplus of earnings

and receipts over and above the cost of operating and ex-
117 penditures aforesaid, then the same shall be paid over to the said railway company to be applied to its purpose; and in case any deficiency arises from any such use and operation said railway company shall reimburse the same to the said construction company.

ARTICLE IX.

The said construction company hereby further covenants and agrees that it shall and will, at all times, so long as it shall have possession of any portion, section or division of said line of railway and telegraph and up to the time when the same shall be delivered over to the said railway company and accepted by it as hereinbefore provided, well and truly pay off and discharge or cause to be paid off and discharged, each and every tax, assessment or other liability and governmental charge, if any, which may from time to time be lawfully levied or imposed by competent authority upon the said property so retained by it or in its possession, or upon any part thereof, the lien whereof might or could be held to attach to the said property, subsequent to the delivery thereof to the said railway company; and that it shall not in any manner, create, suffer, or permit any lien or incumbrance to attach to or be and remain upon said railway and telegraph lines or any part thereof, or any property real or personal, or mixed, to be furnished or delivered by it therewith, except respecting rolling stock, as aforesaid, either for the purchase price thereof or for laborers' wages, or materials furnished or moneys borrowed, or any cause whatsoever; and that said railway lines, and each section and division thereof which it may construct under this or any supplementary contract, for or on account of the said railway company, shall, at the time of the possession thereof be delivered to said company and accepted by it, be absolutely free and clear from all and every lien, charge or incumbrance made, suffered or permitted by the said construction company; and that it will, upon the demand of the said railway company, furnish and deliver to the said railway company satisfactory evidence that the same are free and clear from all liens and incumbrances
118 aforesaid, and that there are no outstanding claims or liabilities against said construction company incurred on account of laborers' wages or material furnished, or otherwise, by reason whereof any subsequent lien or incumbrance could be perfected against that part or portion of the railway delivered over as aforesaid to the said railway company; and that against all and every such claim or liability, lien or incumbrance, the said construction company hereby covenants and agrees to save harmless the said railway company, its successors and assigns forever.

ARTICLE X.

And it is further mutually covenanted and agreed by and between said parties, that if in the course of construction and equipment of any division or divisions of the said railway and telegraph lines,

the work thereof shall not be progressing so as to have it completed within the time specified by this contract, or by any supplemental contract which may be entered into between said parties in respect thereto, that the said railway company may, by written notice, require the said construction company to increase the force and hasten the procuring of materials and equipment and the building of structures on such division or divisions sufficient to insure the completion thereof within the time specified in the contract relating thereto; and if within thirty days after the receipt of such notice, the said construction company shall not increase the working force and hasten the supply of materials and equipments, and the building of necessary structures, so that there is reasonable certainty that the whole will be completed within the time specified by such contract, and ready for the delivery to the said railway company, then and in such case the railway company may, in its discretion, employ such additional force and procure such requisite material, equipment and construction of necessary buildings and structures on such division or divisions, and cause the said work of construction to proceed with diligence, and charge all expenses and
119 disbursements by it incurred in that behalf against the said construction company, which shall allow and pay the same to the said railway company.

But the said railway company shall have the right, at its election and in its discretion, after the expiration of the said thirty days after service of said notice, in case the said construction company shall not increase the working force and hasten the supply of materials and equipments, and the building of necessary structures as required by it by said notice, to terminate this contract and all supplemental contracts relating to the said lines of railway, and take possession of all the work of construction that which has theretofore been done by said construction company, and have and hold the same, and may sublet the same to other contractors, or may proceed by itself with the said work of construction, and hold the said construction company liable in damages for any loss which may result to it from its failure to perform its part of the contract, or any such supplemental contract or contracts.

Article XI.

And it is further covenanted and agreed by and between said parties, that this contract, or any supplemental contract or contracts, may terminate at any time by their mutual consent in writing, or in case such mutual consent cannot be had and obtained, then the said railway company shall have the right, upon giving sixty days' notice in writing of its intention so to do, to terminate this contract and any such supplemental contract or contracts as may be made thereunder with reference to the said lines of railway, and that thereupon and on the expiration of the said sixty days, and at the time specified in the said notice of termination, this contract or such supplementary contracts, shall thereupon cease and determine; and the said construction company does agree that upon such ter-

mination it will peaceably surrender and deliver over to the said railway company all work done by it upon or along all the
120 routes aforesaid, together with all structures, buildings, fixtures, erections and otherwise pertaining to the performance on its behalf of the terms and provisions of this contract; and the said parties shall thereupon settle and adjust all their accounts under this or any such supplemental contract, and the said construction company shall transfer and deliver over to the said railway company thereupon, all and singular all materials, property, tools, utensils and implements, surveys, books, maps and papers which it has acquired and shall have in its possession with reference to the performance of this contract, upon a price to be then and there mutually agreed upon between said parties; and the said railway company shall thereupon settle and adjust all the just claims of the said construction company against it by reason of the performance of work and labor, and furnishing materials and otherwise, as under and according to the terms and provisions of this contract or any such supplemental contract or contracts.

ARTICLE XII.

And it is further mutually covenanted and agreed by and between the said parties, that in case any disagreement or difficulty shall arise between them as to the proper construction of any of the provisions of this contract, or as to the proper compliance therewith by either party, or as to any other matter or thing resulting therefrom, or as to any such supplementary contract or contracts pertaining to any or either of the said routes or lines of railway, the same shall be submitted for arbitration to three arbiters, one of whom shall be selected by the said railway company, one by the said construction company, and the third shall be selected by those two, and the matter in difference shall be submitted to the three so selected, with such books, papers, writings and other things as they may require, or as either of the said parties may elect to submit in its behalf, and after due consideration such arbiters shall make their award in writing, and the award of a majority of them de-
121–688 livered in duplicate to the parties hereto, shall be final, as to the subject of such disagreement, and be binding upon, and be observed and performed by each of the said companies.

In witness whereof, the said parties have caused their corporate seals to be hereto affixed, and the same to be attested by their respective presidents and secretaries, on the day and in the year first aforesaid, by authority of their respective boards of directors.

DENVER & RIO GRANDE WESTERN RY. CO.,

[SEAL.] By W. J. PALMER, *President.*

RIO GRANDE WESTERN CONS. CO.,

By WALTER HINCHMAN, *Pres't.*

689 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH AND JORDAN VALLEY RAILROAD COMPANY ET AL., Defendants.

Affidavit of George Foster Peabody, Verified April 12th, 1901, in Reply to Additional Affidavit of Complainant, Verified April 9th, 1901.

SOUTHERN DISTRICT OF NEW YORK, *County of New York*, } ss:

George Foster Peabody, being duly sworn, says: I have read a copy of the additional affidavit verified by the complainant, Nathaniel W. Raphael, on 9th April, 1901.

The printed cuttings from newspapers appended to his affidavit are correct. One stipulation of the agreement for the sale of common stock of the Rio Grande Western Railway Company made by my banking firm of Spencer Trask & Company is that my said firm shall guarantee the purchaser against any claim of the complainant in this suit. The statement in that respect contained in the circular letter of my firm to the holders of the common stock of that company, of which one of such cuttings is a copy, is as follows:

"Since the commencement of the negotiation one Raphael has instituted in the United States circuit court for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in
690 that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, *but also by a special amount to be held in trust.* I am advised by the counsel of the Western Company that such provision is a fact against, and not in favor of, the complainant's motion, as it gives a greater assurance that, if the complainant's claim shall be established, it will be paid.

The statement of the said Raphael in his affidavit that the retention of a fund to indemnify my said firm for their proposed guaranty against complainant's claim, is an attempt on the part of the Western Company to hinder and delay the complainant, is unqualifiedly

false. The Western Company is in no way a party to the agreement or provision for such indemnity or such guaranty. The Western Company, if the purchase of its common stock shall be completed, will be itself indemnified against my claim of complainant.

I do not know, and I am perfectly confident and charge that the complainant does not know, and cannot truthfully state, what the policy of the Denver & Rio Grande Railroad Company with regard to its charges on long hauls and short hauls will be, if it shall acquire the majority of the common stock of the Western Company. The Bingham and Wasatch (or Alta) spurs of the railroad of the Western Company have been treated ever since 1882 as an integral part of the railroad of the Western Company. It is that fact and the ownership of the Bingham spur by the Western Company which has justified the Western Company in making its large investment for standard gauging, laying with heavy rails and otherwise improving that spur. The statement as to the stifling of competition by the Rio Grande Western Railway Company in the shipment of
691 coal is without foundation. The Western Company does not now own or control, nor has it owned or controlled, coal mines. There are, upon the main line of the Western Company large coal mines which ship great quantities of coal northwardly to Salt Lake City and Ogden, and, naturally and properly enough, to such purchasers of coal as there may be on the Bingham and Wasatch spurs.

As I am informed and believe, the statement of the complainant that the earnings of the Bingham and Alta branches were greater per mile of road than the earnings of the Rio Grande Western, while the Bingham and Alta spurs were operated separately, is untrue. So is the statement untrue that the Bingham and Alta branches feed the main line, but not *vice versa*. It is true that the Bingham and Alta branches feed the main line. It is also true that the main line feeds the Bingham and Alta branches. It is untrue that, as the Bingham and Alta branches are now operated, they are not having a fair chance to carry on their own business and on principles which would work out for their own best good. On the contrary, it is for the best good of the several branches that they should be, as they have been for many years, such integral part of the Western railroad. The statement that under the present management of the Western Company the Bingham branch gets merely mileage is untrue. That branch is not separately run.

The assertion that the complainant has no means of knowing about freight rates unless a receiver be appointed, is untrue. The entire record of the Bingham and Alta spurs will be carefully preserved during the pendency of this action. I am informed and believe that it is no ground for the appointment of a receiver that a receivership would aid the complainant to obtain evidence. At any rate, he does not need such aid to obtain such evidence.

The complainant's assertion or implication as to what the branches could earn if independently managed is unfounded. It is true as he says, that, if they were independently managed, a demand for mile-

age securing additional income could be made. It is equally
692 true that such demand could and probably would be rejected. It is obvious that, if the Bingham and Alta spurs were independently managed and were to demand more than their proper share of rates, their managers would simply compel the Western Company, if it were independent, to construct, as it easily could, other branches in their stead.

The complainant says in his affidavit that he obtained the ownership of the bonds upon which he sues "in the year 1898, the greater part, and in 1899." In his bill of complaint, which was verified by him under oath, he stated that he first obtained the knowledge of what he characterized as the fraudulent proceedings in the matter of the foreclosure sale of the Bingham and Wasatch spurs in August, 1898. In view of the statement of his last affidavit, I believe and charge that all of the information which, in his bill of complaint he said he acquired in August, 1898, he acquired prior to the acquisition of such interest, if any, as he has in the bonds upon which he sues. In his last affidavit, the complainant says that at the time he obtained the ownership of such bonds, there were attached to a part of them "*several years* of defaulted interest coupons." As I am informed and believe, there were attached to all, or the greater part of such bonds, not only coupons for "several years" but coupons for the entire period from and after 1st July, 1880. A portion of the information upon that subject upon which I speak, is the complainant's own statement in his bill of complaint to the effect that the interest accrued on 1st January, 1901, upon the 579 bonds upon which he sues, was the sum of eight hundred and twenty-five thousand nine hundred and seventy-six and 83/100 dollars ($825,976.83), being interest at seven (7) per cent., the rate of interest on the bonds, for twenty (20) years, four (4) months and seven and one-half (7½) days.

GEORGE FOSTER PEABODY.

Sworn to before me this 12th day of April, 1901.

[SEAL.] WM. MASON SMITH,
Notary Public, N. Y. Co.

693 EXHIBIT E.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *against* WASATCH & JORDAN VALLEY RAILROAD COMpany, The Rio Grande Wreste-n Railway Company, Union Trust Company of New York, Trustee; The Central Trust Company, Trustee; The Morton Trust Company, Trustee, Defendants.	In Equity. 394.

Supplemental Affidavits on Motion for Receiver and Amendment to Bill of Complaint.

Charles L. Easton, of New York city.
Pierce, Critchlow, & Barrette, of Salt Lake City, solicitors for complainant.

U. S. circuit court, filed Apr. 30 1901.
JOHN A. SHIELDS, *Clerk.*

694 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *against* WASATCH & JORDAN VALLEY RAILROAD Company, The Rio Grande Western Railroad Company, and Union Trust Company of New York, as Trustee, Defendants.	In Equity. No. 394.

UNITED STATES OF AMERICA, *Southern District of New York, County of New York,* } *ss:*

Nathaniel W. Raphael, being first duly sworn, deposes and says: That this day he made inquiry of the secretary of the New York stock exchange, and that he was informed that on the 13th day of March, 1901, the Rio Grande Western Railroad Company listed $4,000,000 additional of its first consolidated collateral mortgage 4 per cent. 50 year gold bonds, secured by a mortgage executed by said railroad company and dated April 1, 1899.

695 Deponent is unable to say whether the $4,000,000 is in addition to the $19,000,000 set forth in deponent's former affidavit herein or not, but deponent believes that it is additional to the amount of $19,000,000 as stated in said former affidavit.

Deponent further says that the 44 miles of road and equipment covered by the trust deed of May 1, 1879, which was given to secure

the $884,000 of bonds, including deponent's bonds, is inadequate security for the payment of said bonds and interest, and deponent believes that unless the rents and income of said mortgaged premises are taken possession of by a receiver, to be appointed pending this action, that, that fund during the pendency of this action will be diverted by the defendant, The Rio Grande Western Railroad Company, and applied to its own uses, and complainant's bonds will thereby be deprived of such additional security as is called for by said trust deed to the payment of complainant's bonds.

NATHANIEL W. RAPHAEL.

Subscribed to and sworn to before me this 19th day of March, 1901.

HENRY FLUEGLMAN,
Notary Public, N. Y. Co.

696 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO GRANDE WESTERN RAILROAD COMPANY and UNION TRUST COMPANY of New York, as Trustee, *et al.*, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } *ss:*

Nathaniel W. Raphael, being first duly sworn, deposes and says that the annexed advertisement appeared in the New York Herald on April 6, 1901, and made a part hereof, and deponent says that that portion of the advertisement of Spencer Trask & Co. which refers to the above entitled suit, wherein Spencer Trask & Co., propose to retain in their hands out of the proceeds of the sale of the shares of the capital stock of the defendant, The Rio Grande Western Railway Company, a sum of money to indemnify said Spencer Trask & Company in their proposed guarantee against complainant's claim to the Bingham and Alta branches, as deponent is informed and believes, to be an attempt on the part of the said The
697 Rio Grande Western Railway Company, to hinder and delay the complainant in the prosecution of said suit, and the recovery of the income which the said defendant, The Rio Grande Western Railway Company, is receiving from the operation of the said Bingham and Alta branches, and will receive unless a receiver is appointed as already asked for said branches, pending this suit.

Deponent further states as he is informed and believes, that the said consolidation scheme as set out in said advertisement if allowed to be accomplished without the court shall appoint a receiver of the said Bingham and Alta branches pending this suit, will greatly

lessen the income of the said Bingham and Alta branches, for the reason, as deponent is informed and believes, that the mileage of the defendant, The Rio Grande Western Railway Company, will be increased in proportion to the present mileage of the Denver & Rio Grande Railroad Company, and that in the shipment of ores from the Bingham mines over the Bingham branch, and from the Alta mines over the Alta branch, the new management will collect and charge a less amount on the long hauls than on the short hauls; in other words, the Bingham and Alta branches are feeders of freight to the main line of the defendant, The Rio Grande Western Railway Company, and that as deponent is informed and believes, the said The Rio Grande Western Railway Company does not contribute more freight as originating upon the main line and passing over the Bingham and Alta branches up to the mines than the Alta & Bingham branches furnish the said main line of the Rio Grande Western Railway Company.

Deponent is informed and believes that the mining timber and lumber that is now shipped over the Bingham & Alta branches originates entirely upon the Oregon Short Line Railroad Company,
698 which connects with said Bingham and Alta branches at Sandy station on the Oregon Short Line road, and that as deponent is informed and believes, the coal which is shipped over the Bingham and Alta branches comes from the coal mines either owned or controlled by the Rio Grande Western Railway Company, and that under the present management of the Rio Grande Western Railway Company, there is no encouragement to other coal miners to sell their coal to the purchaser of coal on the line of Bingham and Alta branches; in other words, the present management of the Rio Grande Western Railway Company in the coal shipments stifles competition in the shipment of coal over said branches from other coal mines on the line of the Oregon Short Line and its connecting roads.

Deponent is informed and believes and so states the fact to be that the earnings of the Bingham and Alta branches were greater per mile of road than the earnings of the Rio Grande Western while the Bingham and Alta branches were operated separately; and deponent is informed and believes that the Denver & Rio Grande Western, the predecessors of the defendant, The Rio Grande Western Railway Company did not take over the Bingham and Alta branches for the benefit of those branches but said branches were taken over for the benefit of the main line—to afford traffic for it as a feeder; in other words, the Bingham and Alta branches feed the main line not *vice versa* and it does not feed any other road although these branches are in direct connection at Sandy station with the Oregon Short Line. Deponent is informed and believes as he understands railroading the tariff and everything else connected with the railroads are adjusted with reference to the benefit to be derived by the whole system, not by the branch lines alone, so that as the branches are now operated, it cannot be said that they are having a fair chance to carry on their own business or principles

699 which would work out the best goods for said branches. For example, how much freight originating on the Oregon Shore Line points can these branches hope to carry as against similar, perhaps inferior commodities originating on the line of the Rio Grande Western? Deponent is informed and believes that the Bingham branch is shipping large quantities of ore from the Bingham mines billed directly over the Rio Grande Western railway to Denver, with the privilege of sampling those ores from the Bingham mines at either Bingham junction or Salt Lake City, and as deponent is informed and believes under the present management of the Rio Grande Western the Bingham branch gets merely its mileage as against 750 or 800 miles which is allotted to the main line. At all events, under the present management of the Rio Grande Western, complainant has no means of knowing unless there was a receiver appointed pending this litigation, to operate said branches, but what the same system would be continued to be employed in the adjustment of the freight rate, as now conducted. And it would only be common, every day railroading so to do, whereas, deponent is informed and believes if the branches were independent in their management a constructive mileage would be demanded and the present income of said branches would be much larger, and a flat rate as against the rates of either the Rio Grande Western or the Oregon Short Line and their connections would be obtained for said branches, and there would be competition between these last two named railroads for the business of said branches.

Deponent further says that he obtained the ownership of his said bonds mentioned in the bill of complaint in the year 1898 the greater part, and in 1899, and that there were attached and a part of said bonds, several years of defaulted interest coupons, but that when deponent purchased said bonds he purchased the same in
700–703 good faith; that he never had any knowledge before he purchased the same but what the said bonds were lawfully acquired and owned by the persons from whom he made said purchases, for which he paid valuable consideration. That he never had any knowledge before he bought said bonds, that said bonds had ever been used for any other purpose other than to provide money for the said defendant The Wasatch & Jordan Valley Railroad Company, and that he never had any knowledge before he purchased said bonds that said bonds had ever been used or hypothecated for the individual indebtedness of any of the officers of the said defendant, The Wasatch & Jordan Valley Railroad Company, and that deponent never had the slightest suspicion but what said bonds were rightly put into circulation at the time deponent purchased said bonds, and at the time that they were countersigned by the defendant, The Union Trust Company of New York City.

Deponent therefore states that he believes unless a receiver is appointed to take charge and operate said branches, that the said income of said branches will be greatly lessened and will be deprived from the application on the final hearing of this case to the payment of complainant's bond.

Further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to this 9th day of April, 1901.

[SEAL.] WILLIAM W. BARRY,
Notary Public, New York County.

704 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO GRANDE WESTERN RAILROAD COMPANY, and UNION TRUST COMPANY OF NEW YORK, as Trustee, *et al.*, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } *ss:*

Nathaniel W. Raphael, being duly sworn, deposes and says:

That he made a mistake in his bill of complaint (on page 6, printed bill), when he stated that he had discovered the "fraud" in the month of July, 1898, which should have been in the year 1899, in the month of July, and in his affidavit which he made on the 9th inst., he made a mistake in stating that he purchased the greater portion of his bonds in 1898, when it should have been in the year 1899.

Deponent says that he purchased in June, 1899, 407 of his said bonds, and shortly thereafter in 1899 he purchased the balance of the 579 bonds which he owns and which are described in the
705 bill of complaint. That just before he purchased the first lot of bonds, having been solicited to purchase them, he examined Poor's Railroad Manual for the year 1879, and he found the following report:

"Wasatch and Jordan Valley railroad."

Line of road: Bingham city, U. T., to Alta city, U. T. 44.20 miles. Sidings and other tracks, 13 miles. Gauge, 3 feet. Rail 30 lbs. Built up in 1872 from Sandy up Cottonwood cañon to Granite, and in 1876 to Alta. In 1878 the Bingham Cañon and Camp Floyd R. R. was merged, making the total length 44.20 miles.

Rolling stock: Locomotive engines, 7. Freight and ore cars, 300.

Operations for the three years 1876, 1877 and 1878. Gross receipts $734,021.80. Operating expenses $340,462.66. Net earnings $393,559.14. Average net earnings per annum, $131,186.38; interest on bonds, $61,880; undivided remainder $67,306.38.

Financial statement: Capital stock $1,100,000; and 7 per cent. gold bonds $884,000—total stock and bonds $1,984,000. Interest May and November, Union Trust Company, New York city, trustee.

Directors (elected May 6th, 1879) C. M. Schofield, New York city, N. Y.; B. H. Morgan, J. G. Kennedy, and G. M. Young, Salt Lake City, Utah T.; and Charles Lockhart, Pittsburg, Pa.

C. M. Schofield, president, New York city.

B. H. Morgan, vice-president, Salt Lake City, U. T.

Sec'y and treas. J. G. Kennedy, gen'l sup't G. M. Young.

Principal office and address 115 and 117 B'way, New York, N. Y."

That shortly after he made his purchase, he went in the month of June, to the Union Trust Company, the trustee in the trust deed of May 1st, 1879, in this city, and inquired whether the trust deed of May 1st, 1879, had been foreclosed, and what the trust
706 company knew about these bonds, and the bond clerk of the trust company furnished deponent with the following memorandum:

"Merged into the Rio Grande Western R'y Co. Principal offices, Salt Lake City. W. J. Palmer, pt., Colorado Springs, Col., Geo. Forbes Peabody, V. P., 29 Pine St., N. Y. Chas. W. Drake, sec. & tr., 11 Broadway."

Deponent called upon the secretary of the Rio Grande Western Railway Company at the office of the railway company, 11 Broadway, New York city, immediately after receiving the above memorandum and deponent asked the secretary of the railway company, whom he saw, at his said office, what he knew about complainant's bonds, deponent showed the secretary at that time one of his said bonds. The secretary of the railway company said to deponent that Mr. Theodore F. H. Meyer, who was the attorney of said railway company, and who had an office in the city of New York, could inform deponent in reference to the bonds. Deponent immediately called upon Mr. Meyer at his office in New York and finding him in his office he showed Mr. Meyer one of deponent's bonds and asked him what he knew about the bonds. Mr. Meyer replied that the bonds were second mortgage bonds and deponent answered that the bonds read "first mortgage" bonds. Deponent then showed Mr. Meyer the memorandum which the bond clerk of the Union Trust Company had furnished deponent as above described and Mr. Meyer read it and remarked that the memorandum was not correct in this particular that the railroad executing these bonds had not "merged" into the Rio Grande Western Railroad Company, but that the Rio Grande Western Railway Company had "purchased" the railroad. Deponent at that time did not know that the Rio Grande Western Railway Company had "purchased" the road at mortgage
707 foreclosure sale of the underlying bonds, nor was he told at that time by Mr. Meyer that the "purchase" was at a mortgage foreclosure sale of the underlying mortgages.

Shortly after this interview with Mr. Meyer, deponent learned that Charles W. Schofield, the president of the Wasatch & Jordan Valley Railroad Company, and who had signed the bonds in question, was living in the city of New York.

Deponent did not know Mr. Schofield, he had never seen him.

Deponent found Mr. Schofield after considerable search and inquired of him what he knew about deponent's bonds. Mr. Schofield replied that in 1880 he owned a controlling interest in that railroad and that in the spring of that year he had failed in business and had made an assignment under the insolvent laws of the State of New York, and that he had lost all of his interest in the road. Mr. Schofield was reluctant to furnish deponent any information in regard to the bonds, but he finally told deponent that the road had been sold at foreclosure sale of certain underlying bonds that were ahead of deponent's bonds, but that that sale did not cover several miles of extension of the Bingham branch. Not being able to obtain any further information at that time from Mr. Schofield deponent had another interview and perhaps two interviews within a short time after the first interview with Mr. Schofield, when Mr. Schofield told deponent that he had been employed by Charles F. Woerishoffer to purchase the underlying bonds on this road, and that Mr. Woerishoffer, as compensation for his, Schofield's, services in the matter agreed to give him, Schofield one half interest in the profits growing out of the purchase of the Bingham bonds. Mr. Schofield stated that before Woerishoffer made the purchase of the Bingham bond, he made a statement in writing to Mr. Woerishoffer of the earnings of the road and it was satisfactory, and that Mr. Woerishoffer then purchased the bonds. Mr. Schofield further said that
708 after Mr. Woerishoffer had purchased the bonds on the Bingham branch, and before Mr. Schofield made the foreclosure as one of the trustees, under the Bingham mortgage, Mr. Woerishoffer stated to Mr. Schofield that Gen. Palmer wished a third interest in the Bingham purchase, and therefore he wished Mr. Schofield to consent to take a third interest instead of a half interest and Mr. Schofield said that he consented to that arrangement. Mr. Schofield said that he never had received anything out of the matter as Mr. Woerishoffer died shortly after the property was foreclosed.

Deponent further says that after learning these facts from Mr. Schofield and from Poor's Manual he caused letters to be written to Salt Lake City, for a copy of the trust deed of May 1st, 1879, and also of the underlying mortgages and the deeds of the foreclosure sales, and after receiving these papers or a portion of them, deponent again called on Mr. Meyer, at his office in New York, but deponent was told by Mr. Friend, Meyer's partner, that Mr. Meyer was at his country place on Lake George, in this State. Deponent then said to Mr. Friend that he would like again to talk with Mr. Meyer to see if this bond matter could not be settled as he, deponent, had been informed there never had been any foreclosure of the trust deed of May 1st, 1879, and that from what knowledge he had obtained, deponent stated he believed there was an actual fraud perpetrated in the foreclosure of the underlying mortgages. Mr. Friend then said to deponent that he would write to Mr. Meyer and arrange for a meeting with Mr. Meyer at his country place; that shortly after this conversation with Mr. Friend, he was informed by Mr. Friend that deponent could see Mr. Meyer on a certain day at

a certain hotel on Lake George, and thereupon deponent sometime in the month of August, 1899, went to Lake George and saw Mr. Meyer and deponent then told Mr. Meyer what he, deponent,
709 had learned in regard to the unlawful proceedings attending the sale under the underlying bonds and deponent told Mr. Meyer that he wanted to avoid a lawsuit if possible, and that he had called to see if the matter could not be settled. Mr. Meyer said that he would write to Mr. W. J. Palmer, the president of the Rio Grande Western Railway Company, who was then in London, England, and when he, Meyer, should hear from Mr. Palmer he would let deponent know what could be done in the matter.

Deponent heard nothing further from Mr. Meyer until the early part of October, 1899, when deponent having called at the office of Mr. Meyer was told by Mr. Meyer that Mr. Palmer was in the city of New York, that he had just returned from England, and, Mr. Meyer said, that it was better in such matters that the principals should be got together, and suggested that deponent call on General Palmer. Deponent then told Mr. Meyer he did not personally know Mr. Palmer. Mr. Meyer then gave deponent a letter of introduction and deponent called upon Mr. Palmer at the office of the Rio Grande Western Railroad Company, 11 Broadway, and deponent then stated to Mr. Palmer that he would like to settle the matter and that Mr. Palmer after talking the matter over with deponent, said he would let deponent know in a few days what decision he would come to; and thereupon deponent received the following letter, from the secretary of the railroad company:

"The Rio Grande Western Railway Co.

Geo. A. Krause, secretary.

11 Broadway, New York, *October* 28, 1899.

W. Raphael, Esq., c/o Russell Sage, Esq., 31 Nassau St., city.

Dear Sir: General Palmer wishes me to write to advise
710 you that he has discussed the subject concerning which you called on him several days ago with his associates in the company, and he regrets to say that he cannot propose anything.

Yours truly, GEO. A. KRAUSE."

Deponent after receiving said letter caused communications to be sent to Salt Lake City and obtained copies of the articles of incorporations of all these railroads. Deponent also caused a search to be made for the books of the railroad company showing the receipts, expenses and earnings prior to the foreclosure of the underlying mortgages, and the result of deponent's investigation as to the whereabouts of the account books and records, and from the best information he could get they were delivered to the Denver & Rio Grande Western Railroad Company at the time of the foreclosure of the underlying mortgages by Mr. George M. Young, the last superintendent of the railroad.

Deponent then endeavored to find Mr. Young and not being able

to find him, deponent then caused investigation to be made as to the actual earnings of the Bingham and Alta branches, and from the information he obtained, he was satisfied that the underlying roads were earning more than sufficient to have paid the interest upon the mortgages at the time of the mortgage foreclosure sales.

Deponent thereupon under the advice of his counsel caused a demand to be made in New York city upon Mr. Schofield, as the last president of the railroad company, for the payment of the coupons on complainant's bonds maturing November 1st, 1899, and that having caused said demand to be made, deponent thereupon after six months had elapsed from the time of making said demand, deponent caused a written demand to be made upon the
711 Union Trust Company to declare a default of the principal of deponent's bonds, and to foreclose the trust deed of May 1st, 1879. Deponent's counsel and deponent called upon the officers of the Union Trust Company and tendered to the officers of the trust company complainant's bonds with an offer of indemnity as to the cost of foreclosure proceedings, and requested an early decision. The matter was under consideration by the trust company for a short time and complainant's counsel while it was under consideration by the officers of the trust company prepared and submitted to the trust company a draft of a bill of complaint foreclosing deponent's bonds and asking to redeem from the underlying mortgage foreclosure sales, and also asking for the appointment of a receiver to take possession of the road and collect the rents and income pending the proposed suit. Deponent was informed by his counsel and verily believes it to be true that the draft of that bill of complaint was furnished to the counsel for the trust company and after the same had been considered by the officers of the trust company and the counsel of the trust company, the trust company declined to bring the suit, because the property was such a great distance from New York and also by reason of the property being in possession of the Rio Grande Western Railroad Company, it was evident that the litigation would become prolonged. Thereupon deponent's counsel prepared the bill of complaint which was filed in this action, and that under his advice, learning that the Hon. Edwin M. Shepard, of this city, was counsel for the Rio Grande Western Railway Company as deponent was informed by deponent's counsel, he delivered to Mr. Shepard sometime in the month of July, 1900, a copy of that bill of complaint, and as deponent is informed and believes Mr. Shepard was asked if the matter could not be settled out of
712 court, and as deponent is informed and believes Mr. Shepard replied that he knew nothing about the matter except by hearsay, but that he would be obliged to send a copy of the bill to counsel in Salt Lake City, and to communicate with the officers of the railroad company in Utah, which would take some little time.

Deponent was advised by his counsel of what had been done and decided to wait until an answer had been received from Mr. Shepard, before filing the bill of complaint. Not receiving any answer sometime in the latter part of September, 1900, deponent's counsel called

upon Mr. Shepard and from that time until the filing the bill of complaint in this action there were numerous interviews between deponent's counsel and Mr. Shepard which resulted in not being able to settle the matter. Hence deponent caused the bill of complaint to be filed.

Deponent says that from the time he purchased the said bonds in June, 1899, down to the time of the filing of the bill of complaint, he was diligent in learning the facts in regard to this matter, and that his delay in a great measure was caused, first, by waiting for a decision from Gen. Palmer while he was in England, and from the delay caused in obtaining copies of the documents pertaining to the road that would enable counsel to prepare the bill of complaint, and from the necessary delay of six months from the time demand was made for the payment of the interest coupons before instituting the suit or requesting the trust company to bring the suit, and from the delay while the trust company was considering the matter, and from the time of the decision of the trust company not to bring the suit the delay was caused by the belief that the counsel for the Rio Grande Western Railway Company here in New York would settle the matter, and awaiting his decision after being furnished with a copy of the bill, complainant filed the bill at the earliest op-
713 portunity. Complainant never had any knowledge as to the fraud as told by Schofield or never had any knowledge that the underlying bonds had been foreclosed until he discovered the same from what Schofield had told him and upon inspection of the documents received from Utah.

Deponent says that before he purchased these bonds, he knew nothing of the condition of the Rio Grande Western Railway Company; he never had any knowledge as to what its capital stock was or what its bonded indebtedness was, and, that all the information which he has already given by previous affidavits concerning the Rio Grande Western Railway Company has been acquired by investigation within the last few months. That deponent never knew of the proceedings which resulted in the consolidation of the Denver & Rio Grande Western Railway Company and also the Rio Grande Western Railway Company until deponent's bill of complaint was prepared.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 17th day of April, 1901.

HENRY BENOIT,

[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

714 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *vs.* WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, *et al.*, Defendants.	In Equity. 394.

Amended Bill of Complaint.

To the honorable judges of said court, in chancery sitting:

Nathaniel W. Raphael by leave of the court in that behalf first had, and obtained, brings this, his amendment of his bill of complaint against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, the Union Trust Company of New York, as trustee the Central Trust Company as trustee, and the Morton Trust Company as trustee.

And thereupon your orator complains and makes amendment of his said bill of complaint herein, as follows:

First. After the word "shows" in the third line, page 6,
715 folio 16 of complainant's printed bill, insert the words "complainant did not purchase his said bonds until as follows: In the month of June, 1899, he purchased 407 of his said bonds, and the balance of the 579 bonds he purchased later in the year 1899."

Second. After the word "that" in the third line, page 6, folio 16, of the printed bill of complaint, erase the word "he" and insert in place thereof "complainant;" and in the fourth line of page 6, folio 16 of the printed bill of complaint, erase the figures "1898" and substitute in place thereof the figures "1899;" and in the third line of page 6, folio 17, erase the figures "1898" and in substitution thereof insert the figures "1899."

Wherefore your orator prays, as he has before prayed in his original bill of complaint; and that said defendants may answer the said amended bill of complaint but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the matters stated and charged in the said original bill of complaint and those hereinbefore stated or charged in this your orator's amended bill of complaint.

CHARLES L. EASTON AND
PIERCE, CRITCHLOW & BARRETE, *Solicitors.*

E. B. CRITCHLOW, *Of Counsel.*

716 At a stated term of the circuit court of the United States for the southern district of New York held at the United States Court building in the borough of Manhattan, in the said city on the 1st day of May, 1901.

Present: The Honorable Addison Brown, district judge.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

The motion of the complainant for an injunction having come on to be heard upon the return of an order to show cause issued by the Hon. Addison Brown, judge, on the 30th day of April, 1901, with an order restraining the defendants from selling and delivering stock of the Rio Grande Western Railway Company, now after reading the bill of complaint and the papers therein referred to as "A," "B," "C," "D" and "E," being the bill of complaint, the answer of the Rio Grande Western Railway Company, moving papers and answering papers upon an application made by the complainant for a receiver in a certain suit pending in the circuit court of the United States for the district of Utah in which the complainant was complainant and The Rio Grande Western Railway Company and others were defendants, and after hearing Charles L. Easton, of
717 counsel for the complainant, and after reading the affidavit of the defendants Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols presented by Parsons, Shepard & Ogden, their solicitors appearing specially for those defendants for the purposes of this motion only, and after hearing H. B. Closson and Edward M. Shepard, of counsel for the defendants for the purposes of this motion only, it is

Ordered, that the said restraining order be and the same hereby is vacated; and it is further

Ordered, that the defendants be and they hereby are enjoined until the further order of this court from paying out or parting with the fund or moneys for indemnity, to them or special trust, which shall come to or be in their hands or under their control pursuant to their advertisement bearing date the 2nd day of April, 1901, and thereafter published, addressed "To the stockholders of the Rio Grande Western Railway Company" a copy of which is set forth in the complainant's moving papers; and it is further

Ordered, that the defendants shall be at liberty at any time to specially move upon the said papers now before the court upon the present motion, or any such papers or upon such other papers as they may deem proper, or upon the said papers now before the court or any of them and such other papers as they may deem proper, to vacate the order and direction hereinbefore made concerning such fund or moneys or special trust, and that such motion, if and when so made by the defendants, shall be heard and determined in all respects as if the complainant were moving
718 originally for such order and direction concerning such fund or moneys.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, Filed May 2, 1901, John A. Shields, clerk.

719 (*Alias.*)

The President of the United States of America to Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby commanded as you were before commanded, that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of July, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Nathaniel W. Raphael, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 10th day of June in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America, the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

CHARLES L. EASTON,
Solicitor for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of July, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

720 (Endorsed:) I hereby certify, that on the 10th day of June 1901, at the city of New York, in my district, I personally served the within alias subpœna in equity, upon the within named defendant, E. M. Bulkley, by exhibiting to him the within original, and at the same time leaving with him a copy thereof. I further certify, that at the same time and place, to wit: No. 27 Pine street, New York city, the place of business of said defendants, I served the within alias subpœna in equity upon the within named Spencer Trask, George Foster Peabody, Charles J. Peabody and Acosta Nichols by delivering to and leaving with E. M. Bulkley, their partner in business a copy thereof for each, he accepting service for each defendant as per directions of Charles L. Easton, solicitor for complainant. N. Y. June 11th, 1901. William Henkel, U. S. marshal, S. D. N. Y.—U. S. circuit court, Filed Jun- 11, 1901, John A. Shields, clerk.

721 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant, *against* SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants.	In Equity.

The clerk will please enter our special appearance for the defendants Spencer Trask and George Foster Peabody, for the purpose solely of objecting that this suit cannot be maintained by the plaintiff in this district and that the court has no jurisdiction thereof.

Dated New York, July 1, 1901.

PARSONS, SHEPARD & OGDEN,
111 *Broadway, Borough of Manhattan,*
New York City, N. Y.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, against Spencer Trask and others.—Præcipe for appearance of Spencer Trask and George F. Peabody.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 1, 1901, John A. Shields, clerk.

722 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants. } In Equity.

The clerk will please enter our special appearance for the defendants Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, for the purpose solely of objecting to the jurisdiction of the court.

Dated July 1st, 1901.

PARSONS, SHEPARD & OGDEN,
111 *Broadway, Borough of Manhattan,*
New York City, N. Y.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael against Spencer Trask and others.—Præcipe for appearance of Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 1, 1901, John A. Shields, clerk.

723 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants. } In Equity.

To the judges of the circuit court of the United States for the southern district of New York:

The joint and several plea of the defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, to the bill of complaint of Nathaniel W. Raphael, filed and exhibited against them in the circuit court of the United States for the southern district of New York.

The said defendants appearing specially under protest for the purpose of objecting by this plea to the jurisdiction of the court and for no other, by Parsons, Shepard & Ogden, their solicitors, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth, for plea in bar, nevertheless, to the said bill do plead and aver, that the plaintiff is, and at the commencement of this suit was, a citizen of the State of New
724 Jersey, and that both the defendants Edwin M. Bulkley and Charles J. Peabody are, and at the commencement of this suit were, and for more than eight years prior to such commencement were, likewise citizens of the said State of New Jersey; that neither of the said defendants is or was at the commencement of this suit, or for upwards of eight years has been either a citizen or resident of the State of New York, or of any other State than the said State of New Jersey.

All of which matters and things these defendants do aver and plead in bar to the said bill, and humbly pray the judgment of this honorable court, whether they should make any other or further answer to the said bill hereby pleaded unto as aforesaid.

PARSONS, SHEPARD & OGDEN,
Solicitors for the Defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Appearing Specially for the Purpose Only of Objecting by This Plea to the Jurisdiction of the Court,
111 *Broadway, N. Y. City.*

EDWARD M. SHEPARD, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols
725 being duly and severally sworn, do severally depose and say: I am one of the above named defendants. The foregoing plea is not introduced for delay and the same is true in point of fact.

EDWIN M. BULKLEY.
CHAS. J. PEABODY.
ACOSTA NICHOLS.

Sworn to and subscribed before me, this third day of July, 1901.
[SEAL.] WM. MASON SMITH,
Notary Public, N. Y. Co.

NORTHERN DISTRICT OF NEW YORK, *County of Saratoga,* } ss:

Spencer Trask and George Foster Peabody, being duly and severally sworn, do severally depose and say: I am one of the above named defendants. The foregoing plea is not introduced for delay and the same is true in point of fact.

SPENCER TRASK.
GEORGE FOSTER PEABODY.

Sworn to and subscribed before me, this 5 day of July, 1901.
[SEAL.] MARIE J. V. COSTIGAN,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.
(S'd) EDWARD M. SHEPARD,
Of Counsel for Defendants.

726 (Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, against Spencer Trask and others.—Plea of Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols.—Parsons, Shepard & Ogden, solicitors for said defendants, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 8, 1901, John A. Shields, clerk.

727 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols. } August 28, 1902.

Charles Locke Easton, for complainant.
Parsons, Shepard & Ogden, Mr. Shepard and Mr. Smith, of counsel, for defendants.

THOMAS, *J.:*

The present question relates to the jurisdiction of the court. It appears from the bill that the complainant in 1901 filed a bill in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, and the Union Trust Company of New York, as trustee, to foreclose a mortgage given by the first named company, and to redeem from two underlying mortgages certain spurs of railroad sold on foreclosure and thereafter continued in possession

under claim of title by Rio Grande Western Railway Company for nearly twenty years before the bill was filed, of which company an accounting is also demanded.

The defendants in the present action, composing the firm of Spencer Trask & Co., undertook to obtain certain of the stock of the Rio Grande Western Railway Company, and to sell the same to
728 the representatives of the Denver & Rio Grande railroad, which company proposed to acquire the "railroad of the Rio Grande Western Company by acquiring the common and preferred stock of that company." It is not understood from the bill that any sale or encumbrance of the railway, or its franchises, directly or indirectly, was intended. Spencer Trask & Co., as private individuals, so far as appears, acting for stockholders of the Rio Grande Western Railway Company, and not for that company, proposed to sell stock issued by such company to persons acting for the Denver & Rio Grande Railroad Company. After the undertaking was under way, Spencer Trask & Co. learned of the foreclosure of the second mortgages, and in their public advertisement soliciting stock made the following statement:

"Since the commencement of the negotiations, one Raphael has instituted in the United States circuit court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80. per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

729 The bill states:

"That the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds, and Spencer Trask & Co., by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds."

There are further allegations that the complainant:

"Is informed and believes that if said consolidation as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Co., as to the custody of the said fund, proposed to be created as aforesaid, the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit as

defendants, such remote purchasers, as the Denver & Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spencer Trask & Company from
730 selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company as set forth in the said advertisements of Spencer Trask & Company and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York at and before the completing of said sale of said shares, a sum of money which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own, upon the final hearing of complainant's suit in Utah."

From the above it appears that the complainant seeking to foreclose a second mortgage covering a railroad in Utah, has filed a bill in New York against the members of the firm of Spencer Trask & Co. to prevent them from selling the stock of a company that for nearly twenty years has held the apparent title of such railroad derived from the sale thereof upon prior mortgages.

The first question is whether a suit to restrain private persons from selling the stock of a company is ancillary to a bill filed to foreclose the mortgages on the railway of such company. The defendants in the second suit are in no wise related to the cause of action in the first suit; they hold no property of the obligated corporations; they may not be asked to discharge the judgment,
731 or to render any account looking to its payment; they have made no agreement with the complainant, or that enures to him. They chanced to be dealers, on their own account or that of others, in nowise in privity to any party in the first suit, in the stock of a company whom the complainant hopes to show has no better title to the railway than that of earlier mortgagees in possession; and yet the complainant asks to restrain the transfer of such stock lest the mortgaged premises should not remain "in *statu quo* until the final hearing of complainant's suit in Utah."

Under neither bill is any demand for any relief made against the stockholders, no process could run against them in case of favorable judgment in the first suit, and it would be indifferent to the complainant where or by whom the stock was held. Spencer Trask & Co. are entire strangers to them and to all persons owing them any duty, and no fund reserved by that firm belongs to complainant or could be reached by him, nor is such relief asked. The entire absence of privity between the parties in the second suit to any and all parties in the first suit or to the subject matter thereof; the entire absence of any duty from the defendants personally or as trustees to the complainant, forbids even the suggestion that this suit is ancillary in its nature. A suit is not necessarily ancillary

solely because it pretends to be such, and much less because the complainant so names it. The present bill on its face shows that it cannot be ancillary. The legal relation of the defendants to the former suit as attempted to be alleged is impossible. Mr. Peabody's affidavit doubtless stated his view that the fund was advan-
732 tageous rather than inimical to the complainant and such is the fact, but such expression of view does not estop the firm from procuring a judicial interpretation of the agreement between them, the vendors and vendees. But if this suit be not ancillary this court has not jurisdiction, for two of the defendants and the complainant are residents of the State of New Jersey while three are residents of New York. The complainant does not call attention to any authorities to the effect that jurisdiction of less than all the individual co-partners would be sufficient, while the defendants multiply decisions tending in the holding or expression of views to show that jurisdiction may be acquired only in case all the partners be brought duly before the court.

Stone *v.* South Carolina, 117 U. S. 430;
Mason *v.* Eldred, 6 Wall. 231, 235;
Adams *v.* May, 27 Fed. Rep. 907;
Duchesse d'Auxy *v.* Porter, 41 Fed. Rep. 68;
Bell *v.* Donohue, 17 Fed. Rep. 710.

The conclusion to which these authorities point is aided by
Hooe *v.* Jamieson, 166 U. S. 395–399;
Gage *v.* Carraher, 154 U. S. 656;
Holland *v.* Ryan, 17 Fed. Rep. 1.

A decree will be entered dismissing the bill, with costs.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Raphael *v.* Trask. Opinion, Thomas, J. U. S. circuit court, southern district of New York. Filed Aug. 29, 1902. John A. Shields, clerk.

733 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the rooms of the said court in the United States court house and post office building in the city of New York, on the 15th day of November, 1902.

Present: Hon. Edward B. Thomas, judge.

NATHANIEL W. RAPHAEL, Complainant,
versus
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

This cause having been brought on by the complainant for argument upon the complainant's bill of complaint and upon the plea filed by the defendants, and the cause having been argued by Mr. Easton, of counsel for the complainants, and Mr. Shepard, of counsel for the defendants, it is

Ordered, adjudged and decreed that the said plea of the defendants be, and the same hereby is, sustained, and that thereupon the said bill of complaint be, and the same hereby is, dismissed with costs; and that the injunction granted herein *pendente lite* be, and the same hereby is, vacated: Provided that the complainant shall perfect his appeal and file a supersedeas bond in the sum of fifteen hundred dollars ($1500.) the said injunction to be and remain in force pending the appeal.

EDWARD B. THOMAS, *U. S. J.*

734 (Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael *versus* Spencer Trask and others.—Decree.—Smith & Harkness, solicitors for defendants, 26 Liberty street, New York city.—U. S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

735 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

On reading and filing the verified amended complaint in the above entitled suit, and the affidavit of Charles Locke Easton, complainant's solicitor therein, and upon consideration of the same, and on other good cause shown, it is

Ordered that the defendants in this case and each of them be and appear in this court at the United States court room in the city of New York on Monday October 20th 1902, at 11 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, then and there to show cause, if any they can, why the complainant should not be granted leave to amend his said bill of complaint, as set forth in the verified amended bill of complaint herewith attached; and it is

Further ordered that the said defendants take no further proceedings in said action until the further order of this court.

And on the hearing of this order to show cause the plaintiff may use the original bill of complaint, and the plea of the said defendants thereto, and the exhibits attached to the original bill of
736 complaint, and the opinion of his honor Edward B. Thomas, in allowing the said plea of the said defendants, and order of Judge Brown of May 1st, 1901.

That a copy of said amended bill of complaint duly verified and the said affidavit of Charles Locke Easton the solicitor of the said complainant, together with a copy of this order be served upon the

solicitors of the said defendants, Messrs. Parsons, Shepard & Ogden, five days before the return day.

Utica, Sept. 15th, 1902.

ALFRED C. COXE, *U. S. J.*

Note.

To the defendants:

I have made this motion returnable October 20th because it is the first day that I hold court in the city of New York. Should you desire to have it disposed of at an earlier day and will consent to argue it outside the southern district of New York, I will hear the motion at Utica on Sept. 30th at the U. S. court house at Utica, at 11 o'clock a. m. In case you elect to argue the motion at Utica you are to give Mr. Easton five days' written notice of such election.

A. C. C.

(Endorsed:) U. S. circuit court, southern district of N. Y.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Order to show cause. Charles Locke Easton, solicitor for compl't, 220 Broadway, N. Y.—Copy received, Parsons, Shepard & Ogden, Sept. 16, 1902.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902. John A. Shields, clerk.

737 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

To Parsons, Shepard & Ogden, solicitors for defendants:

Please take notice that at 11 o'clock a. m. on October 20th, 1902, or as soon thereafter as counsel can be heard, the said plaintiff will apply to his honor, Justice Coxe, in the room occupied by him as a court room, in the United States court room, in the city of New York, for permission to file a supplemental bill of complaint in the above entitled action, which application will be based upon the verified petition of said complainant, a copy of which is herewith attached.

CHARLES LOCKE EASTON,
Solicitor for Plaintiff, Office & P. O. Address,
229 Broadway, Manhattan, New York City.

738 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

To the honorable the judges of the United States circuit court for the southern district of New York, in equity sitting:

The petition of Nathaniel W. Raphael, the above complainant, respectfully shows: That on the — day of April, 1901, your petitioner filed his bill of complaint in this honorable court against Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, for the purpose of subjecting a certain fund referred to in said bill of complaint, to the jurisdiction of said court, for an injunction and for other relief.

That on September 15th, 1902, an order was issued by Justice Coxe of said court, directing the defendant to show cause on Monday October 20, 1902, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States court room in the city of New York, why the complainant should not be granted leave to amend his said bill of complaint, as set forth in a
739 verified amended bill of complaint, attached to and made part of said order to show cause.

Your petitioner further shows that since the filing of said original bill of complaint, the said shares of the capital stock, viz: the ten million dollars of the common stock of the Rio Grande Western Railway Company have been purchased and paid for by the Denver & Rio Grande Railroad Company, at $80 per share in pursuance of the said vendor's agreement referred to in said original bill of complaint, and the said common shares have all been delivered to the said Denver & Rio Grande Railway Company, and the greater portion of the preferred stock of the Rio Grande Railway Company have also since the filing of said original bill been exchanged for the preferred shares of the capital stock of the Denver & Rio Grande Railroad Company, on the basis of ten shares of the Rio Grande Railway Company for eleven shares of the Denver & Rio Grande Railroad Company.

Your petitioner further shows that the said Missouri Pacific Railroad Company referred to in said proposed amendment to said original bill, has since the filing of said original bill, purchased a controlling interest in all of the shares of the capital stock of the Denver & Rio Grande Railroad Company, and that in pursuance of said scheme, as set forth in said original bill and said proposed amendment to said original bill, the said Missouri Pacific Railway Company is now in control of the board of directors and officers of the Rio Grande Railway Company, and the Denver & Rio Grande Railway Company. That the following are the officers and directors of the Rio Grande Railway Company, viz: George J. Gould of New York, chairman; Edward P. Jeffery, president, Denver, Colo-
740 rado; Russell Harding, St. Louis, Mo. vice-president; Stephen Little, New York city, secretary; J. W. Gilluly, Denver, treasurer. Directors, George J. Gould, Frank J. Gould, Howard Gould, Jacob H. Schiff, Edward H. Harriman, Winslow S. Pierce, R. M. Galloway, all of New York city; Russell Harding of St. Louis,

and E. T. Jeffery of Denver. New York office of the company, 195 Broadway.

The following are the officers and directors of the Denver & Rio Grande Western Railroad Company: George J. Gould, chairman; E. T. Jeffery, president; Stephen Little, secretary and controller; J. W. Gilluly, treasurer; New York office of the company, 195 Broadway. Directors—George J. Gould, Winslow S. Pierce, Edward H. Harriman, Arthur Coppell and Mortimer L. Schiff, all of New York city and C. W. Warner and Russell Harding of St. Louis, Mo. Edward O. Wolcott and E. T. Jeffery of Denver.

Officers and directors of the Missouri Pacific Railway Company: George J. Gould, president; Frank J. Gould, vice-president; C. G. Warner second vice-president, Russell Harding, third vice-president A. H. Calif, secretary and treasurer. New York office of the company 195 Broadway. Directors, George J. Gould, Russell Sage, John P. Munn, Elwin Gould, Fred T. Gates, E. Parmlee Prentice, Samuel Sloan, Louis Fitzgerald, Howard Gould, Frank J. Gould W. K. Bixby, C. G. Warner and Russell Harding.

Your petitioner further shows upon information and belief that since the filing of said original bill of complaint, out of said moneys realized from the sale of said common shares of the Rio Grande Western Railway Company there has been set aside as a special trust, in pursuance of the offer set forth in the advertisement referred to in the original bill of complaint, and which said fund, your petitioner is informed and believes amounts to about the sum
741 of three millions of dollars and that the said fund is now in the possession and control of said defendants and has been since the said shares were paid for by the said Denver & Rio Grande Railroad Company.

Your petitioner therefore prays that leave may be granted to the complainant to file a supplemental bill of complaint against the said defendants Spencer Trask, George Foster Peabody and Acosta Nichols, in case said proposed amendments to said original bill of complaint are allowed to be filed on the hearing of the said order to show cause; and that said supplemental bill of complaint set out the said facts as set forth, in regard to the consummation of the sale of the said shares of the Rio Grande Railway Company, to the said Denver & Rio Grande Railroad Company, and in turn a sale of the controlling interest of the shares of the capital stock of the Denver & Rio Grande Railroad Company, to the said Missouri Pacific Railway Company, and the fact that said fund of three millions of dollars has been created and is now in the possession and control of said last named defendants and that the said supplemental bill contain- a specific prayer that said fund be turned over to a trust company or receiver or trustee to be selected by this honorable court pending this suit, and that in case the complainant shall succeed in his said suit referred to in said original bill of complaint, pending in the United States circuit court for the district of Utah that said fund be subjected to the payment of any deficiency judgment which the complainant may sustain in case of a foreclosure and sale and

an accounting being had as prayed for in the said suit pending in said Utah court, and for such other relief as complainant's
742 case may require, and as to your honors may seem just and equitable.

NATHANIEL W. RAPHAEL,
By CHARLES LOCKE EASTON,
His Solicitor.

UNITED STATES OF AMERICA,
Southern District of New York, City & County of New York, } ss:

Nathaniel W. Raphael, being first duly sworn deposes and says: That he is the person named as petitioner in the above entitled petition, and that he has read the same, and that the facts as therein stated are true, except as to such matters as are therein stated upon information and belief, but as to those matters he states he believes them to be true.

NATHANIEL W. RAPHAEL.

Sworn and subscribed to before me this 16 day of October, 1902.
PHILIP L. LIEBMAN,
Notary Public, N. Y. Co.

743 (Endorsed:) In the circuit court of the U. S., southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.*, defendants.—Petition for supplemental bill and notice.—Charles Locke Easton, plaintiff's attorney, 229 Broadway, N. Y. city.—Copy received Oct. 16th, 1902. Parsons, Shepard & Ogden, att'ys for def'ts.—U. S. circuit court, southern district of New York, Filed Oct. 28, 1902, John A. Shields, clerk.

744 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

Charles Locke Easton, being first duly sworn, deposes and says: That he is the solicitor for complainant in the above entitled suit, and that the annexed copy of the original bill of complaint was filed in the office of the clerk of the United States circuit court for the southern district of New York, on the — day of April, 1901; and that the annexed copy is a true copy of said bill of complaint; that the defendants on the 8th day of July, 1901, filed a plea to the jurisdiction of said court by Messrs. Parsons, Shepard & Ogden as their solicitors, and that the annexed copy of said plea is a true copy of the same. That on the — day of July, 1902, the cause was

brought on before his honor Judge Thomas, sitting as United States circuit judge for the southern district of New York, for argument upon complainant's bill of complaint, and upon said plea filed by said defendant, and upon the 28th day of August, 1902, his honor Judge Thomas filed his opinion allowing the said plea of the said de-
745 fendants, a copy of which opinion is herewith attached and the same is a true copy thereof; on the 3d day of September, 1902, the solicitors for the said defendants served upon deponent as the solicitor for said complainant, a draft of an order which the solicitors for defendant would present for settlement to his honor, Judge Thomas, at his chambers in the U. S. court house, in the Post Office building, in the county of New York, on the 8th day of September, 1902, at 10.30 o'clock in the forenoon of that day.

Deponent further says that he met a representative of the solicitors of defendant at the chambers of Judge Thomas, in New York city, at the time designated, when it was learned that Judge Thomas was still on his vacation at Sudbury, Vermont, and that he would not be in New York city for some time. Deponent then and there notified the representative of the solicitors of said defendants that he desired, before the said order dismissing said suit should be entered, to be allowed to ask leave of the court under equity rule 35, of this court, to amend complainant's bill of complaint in order to avoid the plea to the jurisdiction of the court, and to make such other amendments to the bill of complaint as he might deem best. The clerk of the court, in the office of John A. Shields, Esq., clerk of said court, stated that he understood that Judge Thomas would be in New York city on the 18th of September inst. to hear motions concerning such cases as he had considered; thereupon the representative of said solicitors for defendants stated to deponent that he would call up for settlement of the order
746 before his honor Judge Thomas on the 18th inst. or when Judge Thomas should return to the city, and would duly notify deponent thereof; on the 9th day of September, 1902, deponent was informed over the telephone by Messrs. Parsons, Shepard & Ogden, solicitors for defendant, that they had delivered a draft prepared by the solicitors for defendants to the clerk of the United States circuit court, for the southern district of New York, to be signed by Judge Thomas. When deponent learned this fact he notified Messrs. Parsons, Shepard & Ogden by telephone that he wished to be heard before Judge Thomas could enter said order, upon a motion for leave to amend complainant's bill of complaint. On September 10th, 1902 deponent wrote Judge Thomas at Sudbury, Vermont, and stated that before the order of dismissal should be entered deponent desired to apply for an order for leave to amend the bill of complaint, and would like to know when his honor, Judge Thomas would be in the city of New York to hear said motion. Judge Thomas replied that he would not be in the city of New York, before the 8th day of October, next; that he would not hear deponent's motion for an order for leave to amend the bill of complaint, as at that time he would take up his criminal calendar; deponent

thereupon on the 11th day of September inst. wrote Judge Thomas that inasmuch as he could not hear the application for leave to amend the bill of complaint deponent would apply to his honor, Justice Alfred C. Coxe at Utica, N. Y. for leave to amend the bill of complaint, and deponent requested Judge Thomas to withhold the entering of said order of dismissal until the hearing of deponent's application to his honor, Justice Coxe.

747 Deponent further says that the amendments to the said bill of complaint herewith submitted by complainant are made in good faith, and not for the purposes of delay in said action, and that deponent believes that no injustice will be done to the said defendants by the granting of leave to complainant to amend his bill of complaint; while, on the contrary deponent believes that if said order is not granted allowing complainant to amend said bill of complaint, that great injustice will be done to the said complainant.

Deponent further says that on the first day of May, 1901, after said original bill of complaiat had been filed, in said action, that his honor, Judge Addison Brown, district judge of the said southern district of New York, sitting as United States circuit judge granted an order against the said defendants restraining them from paying out or parting with the fund or moneys for indemnity to them or special trust which shall come to or be in their hands or under their control pursuant to their advertisement, bearing date the 2d day of April, 1901, and referred to in the said original bill of complaint, a certified copy of which order is herewith attached and made part hereof.

Deponent further says that said order is still in force and remains unvacated, but deponent believes that if the defendants are allowed to enter the said order dismissing said suit thereby vacating said order of Judge Brown, that the said moneys referred to in said order of Judge Brown will be immediately paid out by the said defendants as a special trust, to the great injury of complainant.

748 Deponent further says that his honor, Justice Lacombe has declined to hear any matter pertaining to the above entitled suit, because he says he is disqualified from doing so by reason of having interests in the said bonds and stock of the said Rio Grande Western Railway Company. Deponent further states that his honor Judge Thomas stated when deponent applied to him while sitting as U. S. circuit judge to hear the plea of defendants to the bill of complaint, that it was at great inconvenience that he heard the same in July last, and that he could not give any further time to the hearing of the suit or deponent's proposed application for leave to amend the bill of complaint.

And further deponent saith not.

CHARLES LOCKE EASTON.

Subscribed and sworn to before me this 15th day of September, 1902.

C. W. HIGGISON,
Notary Public, Oneida Co., N. Y.

(Endorsed:) U. S. circuit court, southern district of N. Y.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.*—Affidavit of Charles Locke Easton.—C. L. Easton, solicitor for compl't 229 Broadway, N. Y. C.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

749 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody and Acosta Nichols, Defendants. } In Equity.

To the honorable judges of said court, in chancery sitting:

Nathaniel W. Raphael, by leave of the court in that behalf first had and obtained, brings this his amendment of his bill of complaint against said defendants.

And thereupon your orator complains and makes amendment of his said bill of complaint herein as follows:

First. In folio 2 and folio 27, strike out the names of E. M. Bulkley and Charles J. Peabody, as defendants.

Second. And your orator makes further amendment of his said bill of complaint, at the commencement (of folio 22) of the paragraph "Your orator shows unto your honors as he is informed and believes" and insert after the word "believe" "The Denver & Rio Grande Railroad Company referred to in said advertisement is a corporation incorporated under the laws of the State of Colorado, with the capital stock of 38 million dollars of common stock and $23,580,000 of preferred stock; it operates 1674 miles of railroad in the State of Colorado; it has a bonded indebtedness of $43,140,000, or a total of capitalization and
750 bonds per mile of road owned of $62,645. The gross earnings of the road per mile of road owned is $6,121; the net earnings per mile of road owned is $2,042; the fixed charges per mile of road owned is $1,217. This statement is the financial condition of the road for the year 1900; the road has paid no dividends upon its common stock, but has paid on its preferred stock four per cent. per annum, semi-annually two per cent.; the range of prices in the New York Stock Exchange for the year 1900, for the common stock is 62½ to 34½ cents per share on the par value per share of one hundred dollars each; and the preferred has ranged during the same period at 64½ to 87½ cents per share on the par value per share of one hundred dollars each, while during the same period the gross earnings per mile of road of the Rio Grande Western Railway Company of 620 miles of road owned and operated was $7,276, and the net earnings per mile of road owned and operated were $2,686, and the fixed charges were $1,171 per mile, in other words the Rio Grande Western Railway

Company's gross earnings per mile of road, earned for the year 1900 were $1115. per mile greater than the gross earnings of the Denver & Rio Grande Railroad Company for the same period, and the net earnings of the Rio Grande Western Railway Co. for the same period was $644. per mile of road owned and operated for that same period more than the net earnings of the Denver & Rio Grande Railroad Co. per mile of road owned and operated during that same period.

Your orator further shows as he is informed and believes the object of the proposed purchase of the common stock and the preferred stock by the said Colorado road of the said Utah road
751 (The Rio Grande Western Railway Company) was to enable the surplus earnings of the Utah road to be acquired by the said Colorado road for the purpose of making up the deficiency of earnings of the Colorado road.

Your orator further shows, as he is informed and believes, that the Missouri, Pacific Railway Company, a corporation incorporated under the laws of the State of Missouri, operates 5,324 miles of railroad and that said railroad makes close connection with the said Colorado road at Pueblo in the State of Colorado, and that as your orator is informed and believes, *that* the said scheme of the purchase of the said Utah road by the Colorado road is a part and parcel of a scheme for the said Missouri Pacific when the said Colorado road is in control, and in ownership of the said Utah road, to acquire the ownership and control of a majority of the stock of the said Colorado road; and your orator is informed and believes that when said purchase and control shall have been secured as aforesaid by the Missouri Pacific Railway Company it is the intention and purpose of the interests in control of the Missouri Pacific Railway Company to substitute new directors and officers for those now in control of the said Utah road and the said Colorado road to be selected by the interest controlling the said Missouri Pacific railway; and that the railways owned and operated by the said respective corporations, the said Rio Grande Western Railway Company, and the Denver & Rio Grande Railroad Company, will become a part and parcel of the railroad system of the said Missouri Pacific Railway Company, and that the earnings of the Utah road over and above the neces-
752 sary amount required to pay the fixed charges of the bonded indebtedness of the Utah road, will be used by the Missouri Pacific railway after applying whatever amount is required out of the said net earnings of the Utah road and the Colorado road towards paying their respective fixed charges to pay the obligations of the Missouri Pacific Railway Company. In other words, as your orator is informed and believes, the said scheme will tend to divert to the control of the Missouri Pacific Railway Company, and the Denver & Rio Grande Railroad Company, the present profitable and prosperous condition credit and surplus earnings of the Utah road to build up the want of credit and want of prosperous condition and want of surplus earnings of the Colorado road and the Missouri road.

Your orator further shows that in the year 1900, the Missouri

Pacific Railway Company's gross earnings per mile of road owned were $5,274. and the net earnings were $1414 per mile of road owned, and the fixed charges were $1224 per mile of road owned. The capital stock of the Missouri Pacific is $47,500,000, its bonded indebtedness is $128,580,000; its combined capital stock and bonded indebtedness per mile of road owned is $35,809. The range of prices in the New York stock exchange for the shares of the capital stock of the Missouri Pacific for the year 1900 was 39¾ cents per shares to 72½ per share of the par value of $100. each.

Your orator further shows unto your honors, as he is informed and believes, that the owners of the shares of the capital stock, out of the proceeds of the sale of which the said fund referred to in the said advertisement of Spencer Trask & Company, was allowed
753 to be created, agreed the same should be created for the purpose of paying out of said fund the amount which might be found to be due the complainant upon his said bonds in case he succeeded in his said suit in Utah; and that at the time that the said "fund" was agreed to be created and at the time complainant commenced his suit in Utah the said Spencer Trask & Company were the fiscal agents of the Rio Grande Western Railway Company; that the said Spencer Trask and George Foster Peabody were directors in the board of directors of the Rio Grande Western Railway Company, and George Foster Peabody was vice-president of said road and a member of the executive committee of the board of directors of said road; and the said defendants, George Foster Peabody and Spencer Trask and Acosta Nichols well knew at the time the said "fund" was agreed to be created for the purposes aforesaid that in case complainant succeeded on a final hearing in the Utah case, in obtaining a deficiency decree, against the Rio Grande Western Railway Company, on an accounting of the net earnings, as prayed for in the bill of complaint, filed in that suit in Utah, and after a foreclosure sale of the said 44 miles of road as security for complainant's said bonds said defendants well knew that the said Rio Grande Western Railway Company would not be able to pay the said deficiency judgment in case said scheme of acquiring the Utah road by the Colorado road succeeded and that the said "fund," which was agreed on the part of the stockholders consenting to the creation of said fund, that it was agreed by said stockholders was to be substituted and used in place of the surplus net earnings of the Utah
754 road which might be diverted as aforesaid in carrying out the scheme as aforesaid.

Your orator further shows upon information and belief and so charges the fact to be that the said defendants well knew at the time when said "fund" was created that the said forty-four miles of road in litigation in the Utah suit was inadequate security for the payment of complainant's bonds, and that said fund was created as a trust fund to make up any deficiency that might exist in case of a sale and foreclosure of said 44 miles of road, and that when the said defendants published the said advertisement it was expressly intended and designed not only by the said ninety per cent. of the

shares of the common stock of the Utah road but on the part of the said defendants and by the purchasers of the Utah road that said fund should be made subject to the control and determination and the disposition of the Utah suit; thereby your orator charges the said defendants, as he is informed and believes, made representations to the said purchasers of the said shares of the capital stock of the said Utah road, to wit, to the said Denver & Rio Grande Railroad Company, and the said Missouri Pacific Railway Company that complainant's claim if established in the Utah suit would be paid out of the said fund; and your orator avers upon information and belief that the said purchasers of said shares of said last named railroad proposed to make the said purchase of the said Utah road with the understanding and intention that the said fund should be so used in liquidating the claim of complainant when established in the Utah suit.

Your orator further shows unto your honors that the Bingham branch of the said 44 miles of road in litigation in the Utah suit produces greater gross earnings per mile of road than any
755 portion of the Rio Grande Western Railway systems; that branch is situated in the western mountains of the Jordan valley, in the great copper, lead and other mining regions of that locality, and when the said purchasers of the Utah road agreed to make the said purchase, it was with the express purpose and condition that the Bingham road should not be foreclosed and sold under complainant's mortgage, in case complainant succeeded in establishing his claim in the Utah suit, but that said "fund" should be used in liquidating complainant's claim and prevent a foreclosure of the said 44 miles of road.

Your orator further shows that the said ninety per cent. of the said common stock of the Rio Grande Western Railway Company, referred to in the said advertisement of Spencer Trask & Company, was held and owned at the time of said option, by the Rio Grande Western Construction Company, which company had built and constructed the Rio Grande Western Railway Company, and also held by George Foster Peabody and William J. Palmer, the president of the Rio Grande Western Railway Company, and Spencer Trask & Company, who collectively controlled and owned a majority of the capital stock of the said construction company; and that it was the consent of the directors and officers of the said construction company and of William J. Palmer and George Foster Peabody and said defendant Spencer Trask that the said fund should be created for the purposes aforesaid and particularly to be used as a fund to pay off complainant's claim when established in the Utah suit. William J. Palmer is the president of the Rio Grande Western Railway Company, and with his stock in the Rio Grande Western Construction Company he had controlled, ever since the construc-
756 tion of the Rio Grande Western railway, the election of the board of directors of not only the construction company but of the Rio Grande Western Railway Company and has continued to be president of the said railway company ever since its creation.

Your orator further shows, and he is informed and believes, that the said Rio Grande Western Construction Company, the owner of said common stock of the said Utah road, and the said William J. Palmer and the said George Foster Peabody and Spencer Trask well knew and apprehended at the time — said proposed sale of the Utah road that if they carried out the said "scheme" of practically a consolidation of the Utah road with the Colorado road and it in turn with the Missouri Pacific Railway Company that the earnings of the Utah road would be dissipated by the large indebtedness and obligations and mileage of the Colorado and the Missouri roads, and that there would be no "fund" on a final hearing of the Utah suit to make good complainant's claims unless said fund was so created; and the vendors of the Utah road well knew that the said purchasers, to wit, the Colorado road and the Missouri roads would not become the purchasers of the Utah road unless a fund as proposed by the said advertisement of Spencer Trask & Co. was created to provide for the payment of complainant's said claim if successful in his Utah suit.

Your orator further shows that the said Charles J. Peabody and E. M. Bulkley, are junior members of the said firm of Spencer Trask & Co., and as your orator is informed and believes their interests in the said firm of Spencer Trask & Company
757 are very small; and your orator is informed and believes that said Spencer Trask and George Foster Peabody are the principal owners of the partnership interests of the said firm, and your orator avers that there is no intention of holding any of the members of the said firm personally liable on a money judgment, but that the object of this suit is to subject the said "fund" to the control of this court on the conclusion of the litigation in Utah; and that the reason your orator does not make said Charles J. Peabody and E. M. Bulkley parties defendant to this suit, is because they are residents and citizens of the State of New Jersey, the same State where your orator resides, and that the rights of your orator and the parties in interest in the said fund, your orator is informed and believes, can be litigated and determined completely in this action against the said defendants Spencer Trask, George Foster Peabody and Acosta Nichols without joining as defendants the said non-residents.

Wherefore your orator prays as he has before prayed in his original bill of complaint, except as against the said Charles J. Peabody and E. M. Bulkley; and further your orator prays that the said defendants Spencer Trask, George Foster Peabody, and Acosta Nichols may answer, but not under oath, such oath being hereby waived according to the practice of this court, all and singular the matters stated and charged in said original bill of complaint and those hereinbefore stated and charged in this, your orator's amended bill of complaint.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

758 Office and post office address, 229 Broadway, N. Y. city.

CHARLES LOCKE EASTON, *Of Counsel.*

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

Nathaniel W. Raphael, being first duly sworn, deposes and says that he is the complainant in the above entitled suit, and that he has read the foregoing amendments to his original bill of complaint filed in said action, and that he knows the contents thereof and that the facts therein stated are true, except as to such matters as are therein stated upon information and belief, but as to those matters he states he believes them to be true.

Deponent further says that he believes that unless an order to show cause is issued by this honorable court against the said defendants in said original suit returnable at an early date according to the rules of practice of this court why complainant should not be granted leave to amend his said original bill of complaint herein that an order will be entered by his honor Edward B. Thomas, before whom the sufficiency of a plea on the part of the said defendants has been heard to the jurisdiction of said court in this action will be entered of record in said cause allowing said plea and dismissing said bill of complaint.

Your orator therefore prays that said rule to show cause
759 be so issued and that leave be granted your orator to amend said bill of complaint as aforesaid.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 13th day of September, 1902.

SIDNEY J. COWEN,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.* defendants—Amended bill of complaint.—Charles Locke Easton, solicitor for complainant, 229 Broadway, N. *N.* city.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

760 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

George Foster Peabody, being duly sworn, says: I am a member of the firm of Spencer Trask & Company and one of the defendants in this action. This suit has been brought by the complainant as an ancillary suit or otherwise to make effective such judgment or decree as the complainant might secure in a certain other suit brought by the complainant in January, 1901, in the United States circuit court for the district of Utah against The Rio Grande Western Railway Company and other defendants. Such Utah suit was brought to redeem from foreclosure sales two spurs of the Rio Grande Western railroad, the same being known as the Wasatch and Jordan Valley railroad and the Bingham Canyon and Camp Floyd railroad. Prior to the complainant's institution of such Utah suit, the Rio Grande Western Railway Company or its predecessor in title had been in possession of such spurs of railroad under foreclosure of mortgages thereon, and such possession had
761 continued uninterruptedly and without the suggestion of any adverse claim for about nineteen years. The complainant, a dealer in defaulted securities, bought up a large number of second mortgage bonds on the said spurs secured by a mortgage which had been cut off by the foreclosures in 1881 and 1882. As he testified in the Utah suit he paid for those bonds at the rate of $1.00 or $1.50 per bond of $1,000. He claimed in the suit that he was entitled to recover the par value of the bonds and interest for 18 or 19 years.

The Utah suit was brought to final hearing in April, 1902, at St. Louis before Judge Elmer B. Adams upon an order setting the cause down for argument before him. A large amount of testimony had been taken. In June, 1902, Judge Adams made a decree dismissing the bill. A copy of such decree and also a copy of Judge Adam's opinion are hereto annexed. The court held that the complainant was not a holder of the bonds in good faith. He also held that the foreclosures, under which the Rio Grande Western Railway Company held title, were valid, and also that they were protected by the lapse of time. In the spring of 1901 my firm, on behalf of the owners of a majority of the capital stock of the Rio Grande Western Railway Company were engaged in negotiations for the sale of such stock to representatives of the Denver & Rio Grande Railway Company. While such negotiations were pending the complainant moved for a receiver of the said spurs of railroad. That motion was argued at St. Louis and was denied by the Hon. Amos M. Thayer, circuit judge for the eighth circuit, which includes Utah. The said suit brought by the complainant against the
762 Rio Grande Western Railway Company, and the assertion of the complainant's claim therein, were believed by my firm to be in bad faith and solely for the purposes of discrediting the sale of the stock of the Rio Grande Western Railway Company. My said firm was advised that there were no merits in the suit, but that, nevertheless, the complainant made a claim amounting to upwards

of a million dollars, and that the purchasers of the stock could not be expected to investigate the merits of the claim. My firm gave, therefore, its individual guaranty to the purchasers of the stock against the complainant's claim, and advised the several vendors of the stock who were represented by my said firm that my firm would retain of the proceeds of the stock such amount as counsel should advise would be proper to secure my said firm against such claim. The amount so retained upon the advice of counsel was $20,000. The complainant's assertion that the amount retained was $3,000,000, or that a trust fund of $3,000,000 was constituted is completely and, in my opinion, recklessly false. The amount retained was, as I have stated, the sum of $20,000.

At the time when my firm was about to consummate such sale of common stock of the Rio Grande Western Railway Company,—the sale of such stock and of certain other interests being made for about $15,000,000,—the complainant began this suit in this district, and procured from the Hon. Addison Brown, then district judge, and without any notice, an order restraining the defendants from selling such stock of the Rio Grande Western Railway Company.

That order was served upon the defendants upon the day
763 which the complainant alleged to be the last day for the delivery of such stock under the agreement made between my said firm and the proposed purchasers of the stock. This was done, as I am informed and as I verily believe, solely to compel a settlement of the claim made in Utah against the Rio Grande Western Railway Company. Upon application made to Judge Brown he instantly vacated the injunction, and then made, upon the assent of the counsel of my firm and in order to avoid any delay, an order restraining the defendants until the further order of the court, from parting with such moneys as they should hold in trust to secure themselves against their guaranty given as aforesaid. Such an order would not, of course, injure my said firm during the pendency of the Utah suit inasmuch as during such pendency my said firm was perfectly certain to retain in hand the fund it had to indemnify itself against such guaranty. Now that the Utah suit has been dismissed my said firm desire to distribute the fund. The same amounts, as I have said, to the sum of $20,000.

The defendants on or about the 8th day of July, 1901, filed a plea to the jurisdiction of this court. The hearing upon the bill of complaint and the plea was had before Judge Thomas, sitting as United States circuit judge for the southern district of New York, on the 11th day of July, 1902. The jurisdiction of the court was denied on the ground that there was no Federal question involved; that two of the defendants were citizens of the same State as complainant;

and that this suit was not ancillary to the Utah suit. Upon
764 the argument before Judge Thomas it was suggested, as I am informed by my counsel and believe, that the court might retain jurisdiction as against the defendants other than those who were citizens of the same State as complainant. I annex hereto a

copy of the opinion of Judge Thomas from which it appears that this point was decided by him adversely to the complainant.

As I am informed by my counsel and verily believe, the sole purpose of the proposed amendment is to confer jurisdiction upon the court by omitting from the suit the two defendants Edwin M. Bulkley and Charles J. Peabody; but those defendants are members of the said firm of Spencer Trask & Co. In his proposed amended bill the complainant states that the said "Charles J. Peabody and E. M. Bulkley are junior members of the said firm of Spencer Trask & Company and * * * their interest in the said firm of Spencer Trask & Company is very small." This allegation is made as a reason for omitting them from the bill, although they are members of the firm of Spencer Trask & Co. The allegation that the interests of Messrs. Charles J. Peabody and Edwin M. Bulkley in the said firm are very small is false and, as I believe, recklessly false. I do not believe that the complainant has any information of that kind or any warrant for making such a statement. The defendants Charles J. Peabody and Edwin M. Bulkley have a large and very substantial interest in the firm of Spencer Trask & Co. and are active and important members of that firm. Apart, however, from this consideration, I am informed by my counsel and believe
765 that whether their interests are large or small the complainant cannot maintain his suit against the firm of Spencer Trask & Co. without joining them as defendants; and I am likewise informed and believe that such is the substance of the decision of Judge Thomas made herein.

This suit is brought, as I verily believe, in bad faith and for the purpose of securing an opportunity to subject the defendants to annoying examinations with respect to the sale of the common stock of the Rio Grande Western Railway Company and with respect to confidential matters between my firm and the former holders and also the purchasers of such stock,—matters in no way related to the claim of the complainant against the Rio Grande Western Railway Company itself. The complainant does not have and never has had or claimed to have and has never asserted any claim against the holders of the stock of the Rio Grande Western Railway Company.

Unless the decree dismissing the Utah suit shall be reversed, there is no foundation of any kind for the present suit in which the complainant seeks to enforce a pretended security for the payment of the claim, asserted by him in the Utah suit, against the Rio Grande Western Railway Company. As that suit has been dismissed there is no imaginable propriety in any continuance of this suit. The counsel of the Rio Grande Western Railway Company sought to speed the hearing of the appeal which the complainant has taken from such decree of dismissal. As I am informed by such
766 counsel and verily believe, it was practicable, upon the assent of the complainant, that the appeal should be heard at St. Louis in December, 1902, instead of being delayed until September, 1903, at Denver, Colorado. I annex hereto copies of correspondence between the counsel of the Rio Grande Western Railway Company

and the complainant's counsel, showing the refusal of the complainant's counsel to speed the hearing of such appeal. Instead the complainant's effort is to keep his appeal pending in Utah, and meantime to press on the present suit.

The statements I have made in this affidavit with respect to the facts of the Utah suit are based upon the record in the said Utah suit as stated to me by the counsel for Rio Grande Western Railway Company therein.

GEORGE FOSTER PEABODY.

Sworn to before me, this 20th day of October, 1902.

THOMAS PLUNKETT,

[SEAL.] *Notary Public* (100), *New York County, N. Y.*

767 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, *et al.*
394. On Final Submission.

Memoranda of Conclusions.

ADAMS, *District Judge:*

To intelligently state the conclusions reached a very brief and general statement of the case will suffice.

The complainant is the owner of 579 of the total issue of 884 bonds, each for $1,000. issued by the Wasatch & Jordan Valley Railroad Company, hereinafter called the new Wasatch Company, on May 1, 1879; the payment of the bonds and interest thereon represented by coupons attached was duly secured by a mortgage executed by the new Wasatch Company, conveying its railroad consisting of about thirty-three miles of main line and extensions, to the Union Trust Company, of New York, as trustee; the new Wasatch Company was formed by the consolidation of two previously existing railroad companies, known as the Bingham Cañon & Camp Floyd Railroad Company, and the Wasatch & Jordan Valley Railroad Company, hereinafter called the "Bingham" and "Old Wasatch" companies respectively.

These last named companies had in 1873 and 1874 (each
768 for itself) executed mortgages upon their property to secure issue of bonds then made by them respectively. The last named mortgages were in the year 1881 foreclosed by the execution of powers of sale contained in them and the property conveyed thereby was purchased by a construction company for the Denver & Rio Grande Western Railway Company, and was afterwards deeded to and taken into possession by it. The last named company, in 1889 became consolidated with the State Line & Denver Railway Co., and thereafter existed as a new corporation under the name of The Rio Grande Western Railway Company, one of the defendants

herein. This new company took possession among other things of the properties acquired by its predecessor, the Denver & Rio Grande Western Railway Company at the foreclosure sales of the old Wasatch and Bingham roads and has continued in such possession from 1889 to the date of the institution of this suit, January 7, 1901.

It is claimed by the complainant that the foreclosures of the original old Wasatch and Bingham mortgages were so attended by irregularities and fraud, known to the Denver & Rio Grande Western Railway Company, that they were and now are voidable at the instance of the holders of the bonds secured by the mortgage of the new consolidated Wasatch Company of 1879 and that such bondholders occupying the position of junior mortgagees are entitled to avail themselves of such irregularities and fraud to secure an annulment of the foreclosure sales, and hold the defendant, The Rio Grande and Western Railway Company to the position of a mortgagee in possession of their property.

769–779 The prayer of the bill is to set aside the foreclosure sales of 1881, made under the subsidiary mortgages of the old Wasatch and Bingham roads; to be allowed to redeem the property sold at those sales; to secure an accounting with the Rio Grande Western Railway Company for the use and occupancy of the road by it and its predecessor, the Denver & Rio Grande Western Railway Company, from 1881 to the present date and to foreclose the mortgage of 1879 executed by the new Wasatch Company, securing the payment of the bonds now held by the complainant.

The complainant sues for himself and such other bondholders of the new Wasatch Company as should join in the suit and share in its burdens.

I have carefully considered all the proof in the light of the able and exhaustive arguments and briefs of counsel and have reached the conclusions which I shall state in a brief and comprehensive way only.

First. The complainant does not occupy the position of an innocent purchaser for value of the 579 bonds held by him.

He purchased these bonds in 1899 and found attached to them at the time of his purchase, defaulted coupons, representing interest for about 20 years then last past and a large majority of his bonds when purchased and paid for by him had the name of the certifying trustee punched out, thereby suggesting invalidity of the bonds themselves. He paid the nominal sum of less than $2.00 for each of the bonds with attached coupons so acquired by him. Under such circumstances complainant has only the rights of the original

780 holders of the bonds from whom he acquired them and is chargeable with knowledge of all the facts known by such holders.

Second. There is no substantial evidence of any fraud or improper conduct on the part of the trustees in the underlying mortgages of the old Wasatch and Bingham roads, participated in by the Denver & Rio Grande Railway Company, to prejudic-ally influence or affect

the sale of the properties to the Denver & Rio Grande Western Railway Company.

(*a.*) The properties brought their fair and reasonable value at the sale, and the claim that they were sold for such a grossly inadequate sum as to be in and of itself evidence of fraud, is entirely unsupported by the proof.

(*b.*) There was an undoubted default in the payment of interest on both the old Wasatch and Bingham bonds.

(*c.*) There is no substantial evidence that there were any net earnings in 1880 or 1881, of either of these last mentioned roads, applicable to the payment of interest on their bonds and certainly no evidence that any one, and much less any one whose acts are imputable to the defendant, The Rio Grande Western Railway Company or its predecessor, fraudulently concocted a scheme to divert net earnings to other objects for the purpose of creating a fictitious and false necessity to foreclose the mortgages.

(*d.*) Any and all other suggestions of actual fraud found either in the bill or argument by counsel are without substantial foundation.

781 Third. There were no such irregularities attending the execution of the powers of sale found in either the old Wasatch or Bingham mortgages as to invalidate the sales made.

First as to the old Wasatch mortgage,—

(*a.*) George M. Young was duly appointed trustee in the old Wasatch mortgage pursuant to the power reserved in the mortgage to that end; his appointment was duly made by the surviving trustee, Kountze, to succeed William A. Hall, deceased, and such appointment was consented to by the old Wasatch Company itself, by the action of its president in solemnly approving the same by an instrument in writing under his hand and seal.

If such action of the president without the authorization of the board of directors was irregular, the bondholders ratified and approved Young's appointment and action in making the sale, by their acceptance of the relief granted in the case of Young *v.* Spackman, wherein they appeared to assert their rights to the proceeds of the sale as made by Young and secured distribution by a final decree in the case.

(*b.*) There is, in the light of the provisions of the mortgage and the proofs before me, no merit in the contention of irregularity, because of the publication of the notice of sale in the "Daily Register" of New York, nor because of the adjournment of the sale from December 27, to December 29, 1881, nor because of the alleged failure on the part of the bondholders of the old Wasatch Com-

782 pany to make a formal request for the foreclosure.

Now as to the Bingham mortgage,—

The irregularities complained of in so far as they are similar to those in the old Wasatch sale, need no further consideration.

It is, however, contended that the recitation in the trustee's deed shows that six months had not elapsed after the default in payment of interest and before the sale was actually made as was required by

the mortgage itself. This, in my opinion, is clearly a misapprehension. The recital is: "Whereas on the 22nd day of March, 1881, the said company *had made* default" * * * "and such default *had continued* for more than six months and still continues." This recital fails to sustain the position of counsel for complainant. It does not purport to say that the default began March 22, 1881, but in plain terms says: That the default had been made before March 22nd, and continued for six full months before the sale was actually made.

The foregoing might dispose of the main issues before the court, but there are other most persuasive and conclusive reasons why complainant can not maintain his action.

The defendant, The Rio Grande Western Railway Company and its predecessor in right and title, the Denver & Rio Grande Western Railway Company were for the period of 19 years prior to the commencement of this action in open, notorious and continuous possession of the property now claimed by complainant, asserting in many ways the sole, exclusive and absolute title to the same,
783 not only as against the world in general, but particularly as against any and all the holders of the bonds of the old Wasatch and Bingham roads. They duly recorded the deeds, in terms conveying an absolute title to them; they took possession under such deeds and immediately proceeded to renew and transform the roads thereby acquired and to incorporate the same into a general system; they issued bonds of different series, aggregating millions of dollars upon the entire system and the same have been negotiated for value received and are now held as investors throughout the country; they paid the taxes and public charges as owners of the property. In these and divers other ways, unnecessary to refer to, the defendant, The Rio Grande Western Railway Company and its predecessor, have for fully 19 years advised the world that they claimed to be the absolute owners of the property now in question.

Such being the case the complainant would be barred by the statute of limitations of the State of Utah as found in sections 2859, 2861 and 2865 R. S. of Utah as well as by the equitable doctrine of laches from now prosecuting his present action, even if there had been irregularities or fraud as complained of in the bill.

Of course there is an exception to this general statement, and that is: if the defendant railway company or its predecessor had been guilty of and had so concealed the fraud or fraudulent acts relied upon for relief, that the complainant by the exercise of reasonable diligence could not have discovered their existence, the running of the statute would have been arrested and laches
784 could not have been imputed to complainant during the period of such concealment. But this exception would not have aided the complainant, even if fraud had been practiced by defendant railway company or its predecessor. Of the 579 bonds owned by the complainant, he purchased 355 directly from Charles W. Schofield, who was president of the new Wasatch Railway Com-

pany and one of the trustees in the mortgage of the Bingham road and the proof shows that he actively assisted the complainant in securing the balance of his purchase.

If there were any frauds Schofield knew all about them. The proof shows that he was active in all the transactions of 1879 and 1881, and it also shows that he was in a position to know and might have known all that occurred and I am fully pursuaded that he did know all.

Such being the case and his knowledge being imputable to complainant, the delay in instituting this suit would have been fatal, even if the frauds alleged in the bill had been practiced and participated in and concealed by defendant Rio Grande Western Railway Company, or its predecessor, the Denver & Rio Grande Railway Company.

Apt cases are too familiar to counsel to require or even tolerate citation of authorities to the elementary principles just announced.

Complainant avers in the bill, and his counsel argued at the hearing that the Bingham mortgage of 1874 did not embrace 11 & ½ miles of tramway extensions from the western terminal of the Bingham road; that the Denver & Rio Grande Western Railway Company took possession of these extensions at the time it
785 took possession of the balance of the Bingham road under the foreclosure deed; that these extensions were included in the new Wasatch mortgage of 1879 given to secure the issue of bonds of which complainant holds a part, and that as a result thereof complainant holds a first mortgage lien upon such extension and is entitled to a foreclosure thereunder and an accounting for their use and occupancy as against the defendant Rio Grande Western Railway Company.

A careful consideration of the proof fails to show that any such extensions existed in 1881. The old Bingham mortgage conveyed a line or railroad, beginning at Sandy station in Salt Lake county and "extending thence westerly to a point in Bingham cañon in the same county, a distance of 20 miles from the point of beginning."

The mortgage in terms excluded extensions beyond the terminal points just mentioned, and by necessary implication included extensions within such terminal points.

The main line of this road, as and when constructed, extended westerly from Sandy station to Bingham, a distance of 16 & 13/100 miles. A certain tramway was afterwards, in 1875, constructed to accommodate a mine, but this involved an extension of only 2 & ¾ miles and was per force of the mortgage, made subject thereto.

Another short spur seems to have been constructed for a temporary purpose, but it was abandoned in the year 1876.

All other extensions now appearing in connection with the old Bingham road have been constructed by the Denver & Rio Grande Western Railway Company, or by the Rio Grande Western
786 Railway Company, since the purchase made by the former company in 1881.

It results that complainant's claim to a first mortgage on 11 & ½ miles, or any distance of railroad extension is not well founded. All the railroad property of the old Bingham road passed by the foreclosure sale in 1881 to the Denver & Rio Grande Railway Company, and afterwards in 1889 to the defendant, The Rio Grande Western Railway Company.

The foregoing considerations fully dispose of this case against all the pretensions of the complainant. His charge of fraud and concealment by defendant Rio Grande Western Railway Company and its predecessor in title are supported by no proof worthy of serious consideration and if they were his own want of diligence, and that of his predecessor in ownership of the bonds, with full knowledge of all claimed fraud would disentitle him to the relief sought.

There will be a decree dismissing the bill.

Not for publication in Fed. Reporter.

E. B. A.

Filed at Salt Lake City, June 30, 1902.

JERROLD R. LETCHER, *Clerk.*

787 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,

vs.

WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, that the bill of complaint herein be and the same is hereby dismissed at complainant's costs, for which let execution issue.

June 5th, 1902.

E. B. ADAMS, *Judge.*

Filed at Salt Lake City, Utah, June 30th, 1902.

JERROLD R. LETCHER, *Clerk.*

788 (A copy of Judge Thomas' opinion was annexed, same will be found on page 727.)

789 Copy.

Letterhead of Parsons, Shepard & Ogden.

NEW YORK, 17*th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Rio Grande Western Railway Co.

The notice to counsel issued by the United States circuit court a

St. Louis on the 1st inst. states that no cases filed and docketed after October 1st, 1902, will be assigned to be heard at the December, 1902, term at St. Louis unless advanced by special order of the court. We assume that we have no practical means of compelling the complainant to file and docket the case by October 1st, 1902, unless he shall be willing to do so; but we beg to say that we are now prepared to stipulate the case for the December, 1902, term and beg to ask whether you will agree to the stipulation. We beg to point out to you that under the amended rule 3 of the circuit court of appeals of the eighth judicial district, the case will be delayed until the May term at St. Paul and that even then it can be heard only by stipulation; and that if a stipulation be not made, then the cause cannot be tried until the September term at Denver.

We are informed by Mr. Blair from St. Louis that if the cause be on the December calendar at St. Louis, there will not "be the slightest difficulty in the case being heard" at that term.

Yours respectfully,

(S'g'd) PARSONS, SHEPARD & OGDEN.

790 Copy.

Letterhead of Charles Locke Easton.

NEW YORK, *Sept.* 23, 1902.

Messrs. Parsons, Shepard & Ogden, 111 Broadway, New York city.

DEAR SIRS:

Raphael vs. Rio Grande Western Railway Co. et al.

I am in receipt of your favor of the 17th inst. and contents noted. In reply I beg to say that I have sent today to the clerk of the U. S. circuit court of appeals at St. Louis, the appellant's docket fee, docketing the transcript of the record of this case, which will undoubtedly be done on the 25th inst.

I am not prepared to give you a decision at present in regard to stipulating to hear the case in St. Louis. The reason principally is that I am driven for time in the preparation of some very important cases to come up for argument in the Supreme Court at Washington late this fall, and because I prefer to examine the printed record which the clerk at St. Louis will soon furnish counsel before I decide in reference to the proposed stipulation.

Very truly yours,

(S'g'd) CHARLES LOCKE EASTON.

791 Copy.

Letter head of Parsons, Shepard & Ogden.

NEW YORK, *24th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Rio Grande Western.

We have your letter of the 23rd inst. In order that the case may be heard at St. Louis in December and in order to avoid the delay of the appeal until the Denver term, it is necessary that a stipulation be filed in St. Louis on or before the 1st prox.

We beg to point out that in view of the elaborate argument of the cause in the court below and the exhaustive briefs there submitted by you, it cannot be difficult to be ready for the argument in December. We therefore again respectfully ask for a stipulation which will enable the appeal to be there heard.

Yours truly,

(S'g'd) PARSONS, SHEPARD & OGDEN.

792 Copy.

Letter head of Parsons, Shepard & Ogden.

NEW YORK, *26th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Wasatch.

We are advised of the docketing of this case at St. Louis and are again advised that a stipulation must be filed on or before October first in order that the case may be heard at the December term and that otherwise the hearing will be delayed for a year.

We must respectfully advise you that in case you decline to so stipulate, we shall understand and at any proper time shall insist to the court, that you wish to keep this litigation open and to prevent its termination.

Yours truly,

(S'g'd) PARSONS, SHEPARD & OGDEN.

793 Copy.

Letter head of Charles Locke Easton.

NEW YORK, *Sept.* 26, 1902.

Messrs. Parsons, Shepard & Ogden, 111 Broadway, New York city.

Raphael v. Wasatch & Jordan V. R. R. et al.

GENTLEMEN: I am in receipt of your favors of yesterday and today, in reference to this case. I cannot consent to sign a stipulation for the reasons I have heretofore given you.

Very truly yours,

(S'g'd) CHARLES LOCKE EASTON.

(Endorsed:) U. S. circuit court, southern district of New York. Nathaniel W. Raphael against Spencer Trask and others. Affidavit. Parsons, Shepard & Ogden, attorneys for defendants, 111 Broadway, New York city. U. S. circuit court, southern district of New York. Filed Oct. 28, 1902, John A. Shields, clerk.

794 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL
vs.
SPENCER TRASK ET AL.

On motion of complainant for leave to amend bill and for leave to file supplemental bill.

Charles L. Easton, for complainant.
Edward M. Shepard, for defendants.

COXE, *J.:*

The firm of Spencer Trask & Company is, and during all the time in controversy was, composed of five members, three of them being citizens of the State of New York and two of them being citizens of the State of New Jersey, of which State the complainant is also a citizen. The original bill was filed against all of the members of the firm. The defendants thereafter filed a plea to the jurisdiction alleging the above facts. After full consideration the plea was sustained by Judge Thomas, who directed that an order be entered dismissing the bill. The complainant now asks to amend the bill by dropping the defendants who are citizens of New Jersey so that the suit may proceed against the three remaining defendants who are citizens of New York. If the court be convinced that, as the law is now declared, the amended bill cannot be maintained it should
795 say so *in limine* without putting the parties to the expense and delay of a hearing upon a plea to the amended bill. The decision upon the plea established the following propositions.

First. That the facts whether as stated in the original bill or in the proposed amended bill cannot be regarded as constituting a cause of action ancillary to the foreclosure action pending in Utah, and that upon the facts, which are unquestioned, it is impossible so to consider it.

Second. That all of the members of the firm of Spencer Trask & Company are interested in the fund which complainant seeks to impound, and are necessary parties to the determination of the questions involved.

If the court had been of the opinion that the action could have proceeded without the New Jersey defendants it would not have ordered the dismissal of the bill. The present motions cannot be granted without ignoring the law as thus stated. If the complainant be dissatisfied with the present status of the law his remedy is

by appeal and not by presenting the old facts with new inferences aud conclusions based thereon.

The motions are denied.

(Endorsed:) Circuit court of the United States, southern district of New York.—Nathaniel W. Raphael, *vs.* Spencer Trask, *et al.*—Opinion, Coxe, C. J.—U. S. circuit court, southern district of New York, Filed Oct. 28, 1902, John A. Shields, clerk.

796 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house and post office building in the county of New York, on the 7th day of November, 1902.

Present: Hon. Alfred C. Coxe, judge.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

An order, dated September 15th, 1902, having been made by the Hon. Alfred C. Coxe, one of the judges of this court, requiring the defendants to show cause why the complainant should not be granted leave to amend his bill of complaint herein, and restraining the defendants from taking any further proceedings in the action until the further order of the court; and a motion having been made by the complainant for leave to file a supplemental bill of complaint against the defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and the said motions coming on to be heard together upon the return day of said order to show cause; upon reading and filing the said order to show cause and the papers therein referred to and upon which the same was granted, and the complainant's notice of motion for leave to file a supplemental bill of com-
797 plaint, and the petition of the complainant, verified the 16th day of October, 1902, on which the same was made; and the affidavit of George Foster Peabody, verified the 20th day of October, 1902; and after hearing Charles L. Easton, Esq., of counsel for the complainant, and Edward M. Shepard, Esq., of counsel for the defendants, on motion of Smith & Harkness, solicitors for the defendants, it is

Ordered that the complainant's motion for leave to file an amended bill of complaint, be and the same hereby is, denied, and the order restraining the defendants from taking any further proceedings in this action be, and the same hereby is, vacated; and it is further

Ordered that the complainant's motion for leave to file a supplemental bill of complaint against the defendants Spencer Trask, George Foster Peabody and Acosta Nichols be, and the same hereby is, in all respects, denied.

ALFRED C. COXE, *U. S. J.*

(Endorsed :) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael *vs.* Spencer Trask and others.—Order.—Smith & Harkness, solicitors for defendants 26 Liberty street, New York city.—Due and timely service of the within proposed order with notice of settlement is hereby admitted this 5th day of November, 1902. Charles L. Easton, solicitor for complainant. U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

798 Circuit Court of the United States, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

A final decree having been entered herein on the 15th day of November, 1902, dismissing this suit and the bill of complaint herein,

Now therefore this court in pursuance of the fifth section of the act of Congress, approved March 3d, 1891, and entitled an "Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause as follows:

Is this court without jurisdiction of this cause for the reason that the bill of complaint is not ancillary to the suit pending in the United States circuit court for the district of Utah, and because the defendants Edwin M. Bulkley and Charles J. Peabody are citizens of the same State as the complainant, and are necessary parties defendant to this action.

EDWARD B. THOMAS, *U. S. J.*

Nov. 15 1902.

799 [Endorsed :] E. & A. B. 1981 Original. United States circuit court, southern district of New York. Nathaniel W. Raphael, complainant, ag'st Spencer Trask, *et al.* defendants. Certificate of questions as to jurisdiction of the circuit court of the U. S. for the southern district of New York. U. S. circuit court southern district New York. Filed Nov. 17 1902 John A. Shields, clerk.

800 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKley, Charles J. Peabody, and Acosta Nichols, Defendants.

The complainant herein feeling himself aggrieved by the decision of said court, and the decree of dismissal of the bill of complaint herein, with costs to the defendants, now comes by his solicitor, and counsel, Charles Locke Easton, Esq., and petitions the said court for an order allowing said complainant to prosecute an appeal from said decree of dismissal to the honorable Supreme Court of the United States, under and according to the laws of Congress and the statutes of the United States, in such cases made and provided, and that an order be made keeping in force the order made by said court on the 1st day of May, 1901, restraining the defendants from paying out or parting with the fund or money for indemnity or special trust, more particularly described in said order; and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal, and that upon the giving of such authority all further proceedings in this court be stayed until the determination of said appeal by the said Supreme Court of the United States;

801 And your petitioner will ever pray.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Petition for appeal.—Charles Locke Easton, complainant's solicitor, 229 Broadway, N. Y.—Copy received Nov. 12, 1902, Smith & Harkness.—U. S. circuit court, southern district of New York. Filed Nov. 17, 1902. John A. Shields, clerk.

802 At a stated term of the circuit court of the United States held in and for the southern district of New York, at the United States court house and post office building in the city of New York, on the 15th day of November, 1902.

Present: Hon. Edward B. Thomas, judge.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

The complainant having filed his petition for the allowance of an appeal from the decision therein made and entered herein to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made keeping in force the order entered herein on the 1st day of May, 1901, by this court, restraining the defendants from paying out or parting with the fund or moneys for indemnity or special trust, more particularly described in said order, and also praying that an order be made fixing the amount of security which said complainant should give and furnish upon said appeal, and that upon the giving and furnishing of said security all further proceedings of this court be suspended and stayed until the settlement of said ap-

peal by the Supreme Court of the United States, and said
803 petition having been this day duly allowed:

Now, therefore, it is ordered that upon said complainant, Nathaniel W. Raphael filing with the clerk of this court a good and sufficient bond in the sum of fifteen hundred dollars to the effect that if the complainant, Nathaniel W. Raphael, and appellant, shall prosecute the said appeal to effect and answer all damages and costs, if he fails to make his appeal good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the court and that said order staying the paying out of said trust fund be continued in force during the pendency of said appeal, and that all further proceedings in this court be and are hereby suspended and stayed until the determination of said appeal by the said Supreme Court of the United States, and that said bond become also a bond for damages and costs on said appeal.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Order allowing appeal.—Charles Locke Easton, complainant's solicitor, 229 Broadway, N. Y. C.—Copy received. No. 12, 1902, Smith & Harkness.—U. S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

804 United States Circuit Court, Southern District of New York

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

Comes now the complainant and files the following assignment of errors upon which he will rely.

The United States circuit court for the southern district of New York, which entered the decree of dismissal of complainant's bill of complaint in said cause erred as follows:

I. The court erred in entering a decree dismissing complainant's bill of complaint, for want of jurisdiction.

II. The court erred in sustaining the plea interposed by the defendants to said bill of complaint.

III. The court erred in failing to overrule the plea interposed by the defendants to said bill of complaint.

IV. The court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States circuit court for the district of Utah.

V. The court erred in not holding that complainant's bill of complaint was ancillary to complainant's suit pending in the United States circuit court for the district of Utah.

805 VI. The court erred in not dismissing the plea interposed by all of the defendants to said bill of complaint as an in-

sufficient plea on the part of said defendants Spencer Trask, George Foster Peabody and Acosta Nichols.

VII. The court erred in not holding that the "fund" provided for by the defendants arose from the sale in part of shares of the capital stock of the Rio Grande Western Railway Company issued upon that part of the lines of railroad which was the subject matter of complainant's suit in Utah, and that complainant had a right in this action to be subrogated to the rights of the defendants as an indemnity or special trust "fund" on the determination of the Utah suit.

VIII. The court erred in not holding that the defendants were trustees for the complainant with reference to said "fund."

IX. The court erred in holding that under complainant's bill of complaint, the complainant had no right to any relief in reference to said "fund."

X. The court erred in holding that the original bill or the proposed amended bill was not ancillary to the action pending in Utah.

XI. The court erred in not holding that the original bill or the proposed amended bill was ancillary to the action pending in Utah.

XII. The court erred in holding that Edwin M. Bulkley and Charles J. Peabody were indispensable parties as defendants to this action.

806 XIII. The court erred in not holding that Edwin M. Bulkley and Charles J. Peabody were not indispensable parties as defendants to this action, and that the rights of the parties with reference to the "fund" in question could have been litigated and determined by retaining as defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and dismissing this action as to the defendants Edwin M. Bulkley and Charles J. Peabody.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court, and prays such disposition be made thereof as in equity and in accordance with the law and the statutes of the United States in such cases made and provided and complainant prays a reversal of the decretal order and decree of dismissal made and entered by said court.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.* Complainant's assignment of errors. Charles Locke Easton, solicitor for complainant, 229 Broadway, N. Y. C. U.S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

807 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants.

Bond for Damages and Costs.

Know all men by these presents, that we, Nathaniel W. Raphael and American Surety Company of New York, are held and firmly bound unto the above-named defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, in the sum of fifteen hundred dollars ($1500.), to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of November, in the year of our Lord one thousand nine hundred and two.

Whereas, the complainant herein having filed his petition for the allowance of an appeal from the decision made and entered herein to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made keeping in force the order entered herein May 1, 1901, restraining the defendants from paying out or parting with the fund or
808 moneys for indemnity or special trust, more particularly described in said order, and also praying that an order be made fixing the amount of the security which the complainant should furnish upon said appeal, and upon the giving and furnishing of said security, all further proceedings be suspended and stayed, until the settlement of said appeal by the Supreme Court of the United States, this court upon the presentation and filing of said petition made its order on the 15th day of November, 1902, allowing the said petition and continued in force during the pendency of said appeal the order staying the paying out of said trust fund, and suspended and stayed until the determination of said appeal by the Supreme Court of the United States all further proceedings in this court, upon the complainant filing with the clerk of this court an approved bond for damages and costs in the sum aforesaid to the effect hereinafter set forth.

Now, therefore, the condition of this obligation is such, that if the above-named Nathaniel W. Raphael shall prosecute the said appeal to effect and answer all damages and costs if he fails to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged, this — day of November, 1902, before me.

AMERICAN SURETY COMPANY OF NEW YORK.
DAVID B. SICKELS, *Vice President.*
[SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

106,729.

809 STATE AND COUNTY OF NEW YORK, ss:

On this 18th day of Nov. 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company

of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

[SEAL.] K. J. PEIRCEY,
Notary Public, Kings County, No. 5.

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitting in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 18th day of Nov., 1902.

[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

(Endorsed:) Approved as to form and also as to sufficiency of surety, with reservation, however, to the def't of the right at any time to examine the proper officers of the surety company, under

oath, touching its assets, liabilities and financial condition
811 generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Nov. 18,
1902, John A. Shields, clerk.

812 By the Honorable Edward B. Thomas, acting judge of the circuit court of the United States for the southern district of New York, in the second circuit.

To Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States at Washington, on the 2nd day of January, 1903, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York wherein Nathaniel W. Raphael is plaintiff and you are defendants to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 5th day of December, in the year of our Lord one thousand nine hundred and two, and of the Independence of these United States the one hundred and twenty-seventh.

EDWARD B. THOMAS,
District Judge, Acting as Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Supreme Court.—Nathaniel W. Raphael, pl'ff *vs.* Spencer Trask, *et al.* def'ts.—Citation.—Charles Locke Easton, solicitor for pl'ff, 229 Broadway N. Y. city.—Copy received Dec. 5, 1902, Smith & Harkness, solicitors for defendant, 26 Liberty street, N. Y. city.—U. S. circuit court, southern district of New York, Filed Dec. 9, 1902, John A. Shields, clerk.

813 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 812 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Nathaniel W. Raphael appellant against Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols appellees as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2nd day of March in

the year of our Lord one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

814 [Endorsed:] United States circuit court of appeals for the second circuit. Nathaniel W. Raphael appellant *vs.* Spencer Trask *et al.* appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

815 United States Supreme Court.

NATHANIEL W. RAPHAEL, Complainant-Appellant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Buckley, Charles J. Peabody, and Acosta Nichols, Defendant-Appellees.

626. Oct. Term, 1902.

To Jas. H. McKenney, Esq., clerk Supreme Court of United States.

DEAR SIR: The IV. assignment of errors, filed by appellant in the above entitled cause, is the error on which appellant intends to rely in the prosecution of said appeal.

That error is as follows viz:

"The court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States circuit court for the district of Utah."

Appellant further states that the entire record of said case as filed in your office is necessary for the consideration of said error, except all of Exhibit "C" and all of Exhibit "D" except the affidavit of George Foster Peabody found on pages 297 to 300 in said Exhibit "D."

The appellant insists that it is not necessary to print said Exhibit "C" and only that portion of Exhibit "D" which embraces the said affidavit of George Foster Peabody.

Very truly yours,

CHARLES LOCKE EASTON,
Solicitor and of Counsel for Appellant.

816 To Edward M. Shepard, Esq., of counsel, and Smith & Harkness, solicitors for defendant-appellees, 26 Liberty street, borough of Manhattan, New York city.

DEAR SIRS: Please take notice that I shall file with the clerk of the Supreme Court of the United States on March 5th, 1903, the foregoing notice, in the above entitled action. Dated March 4, 1903.

Very respectfully yours,

CHARLES LOCKE EASTON,
Solicitor and of Counsel for Appellant.

Office and post office address, 229 Broadway, borough of Manhattan, New York city.

Service of a copy of the above notice is this — day of March hereby accepted.

——— ———,

Of Counsel and Solicitors for Defendant-Appellees.

817 UNITED STATES OF AMERICA, *Southern District of New York, City and County of New York,* } *ss:*

Joseph M. Callahan, being duly sworn deposes and says, that he is over the age of 18 years, that he served a copy of the within notice on Edward M. Shepard of counsel and Messrs. Smith & Harkness, solicitors, attorneys for the defendant-appellees, on March 4th, 1903, by leaving a true copy of the same with a person of suitable age and discretion in charge of the office of said attorneys. Deponent further says that he requested admission of service of the same but the person in charge of said office declined to give said admission and stated to deponent that said Edward M. Shepard was in his office at the time, but that he declined to give the acceptance.

JOSEPH M. CALLAHAN.

Sworn to before me this 4th day of March, 1903.

[Seal of Joseph A. Farley, Notary Public, New York Co.]

JOSEPH A. FARLEY,
Notary Public, N. Y. Co.

[Endorsed:] Original U. S. Supreme Court 626—Oct. term 1902 Nathaniel W. Raphael, appellant, ag'st Spencer Trask *et al.* appellees. Notice to the clerk by appellant for portion of the record to print, & proof of service on counsel for appellees Charles Locke Easton, solicitor and of counsel for appellant.

818 [Endorsed:] File No. 18,854. Supreme Court U. S. October term, 1902 Term No. 626. Nathaniel W. Raphael, app't *vs.* Spencer Trask *et al.* Assignment of error and designation by appellant of parts of record to be printed & notice & proof of service. Filed Mar. 7", 1903.

Endorsed on cover: File No. 18854. S. New York C. C. U. S. Term No. 229. Martha Raphael, administratrix of the estate of Nathaniel W. Raphael, appellant, *vs.* Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols. Filed March 5, 1903. File No. 18854.